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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF JOHN W. YENGO, ESQ.,
CHARGED WITH CONTEMPT,

PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Does summary adjudication of criminal contempt *in facie curiae*, premised upon the absence of an attorney from trial, violate the due process guarantees of the Fourteenth Amendment, when the court cannot, without inquiry, ascertain the reasons for the absence?

2. Is the interrogation of counsel by the trial court as to the reasons for counsel's absence from trial violative of the privilege against self-incrimination secured by the Fifth and Fourteenth Amendments, where the answers elicited form the basis for a subsequent summary contempt adjudication and where, a refusal to answer the inquiries of the court, under local decisional precedent, constitutes a sufficient basis for a contempt *in facie curiae*?

3. Does judicial expediency and facility constitute a state interest so compelling as to supercede the Fifth and Fourteenth Amendment rights of an attorney questioned about his absence from

trial, where the answers elicited form the basis for a subsequent retroactive summary contempt adjudication?

4. May a summary criminal contempt proceeding be conducted in camera, especially without notice, independent counsel and warnings relative to the privilege against self-incrimination, or does such hearing violate defendant's right to a public trial as secured by the Sixth and Fourteenth Amendments to the United States Constitution and related due process safeguards?

5. May utilization of substitute counsel by the attorney of record at trial, with the consent of the client, but without prior notice to the court, constitute the basis for a contempt of court adjudication?

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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF JOHN W. YENGO, ESQ.,
CHARGED WITH CONTEMPT,

PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

This is a petition for a writ of certiorari seeking review of the judgment of the Supreme Court of New Jersey entered on August 4, 1980, reversing the judgment of the Superior Court of New Jersey, Appellate Division, and reinstating a summary contempt conviction of petitioner, an attorney-at-law, based upon petitioner's failure to appear for trial.

OPINIONS BELOW

The unreported opinion of the Superior Court of New Jersey, Law Division, adjudging petitioner in contempt of court *in facie curiae* is reprinted in the Appendix hereto.

The opinion of the Superior Court of New Jersey, Appellate Division, reversing the contempt conviction entered by the Law Division is reported as In re Yengo, 167 N.J. Super. 66, 400 A.2d 517 (App. Div. 1979). Certification to the Supreme Court of New Jersey was granted at 81 N.J. 333, 407 A.2d 1207 (1979).

The opinion of the Supreme Court of New Jersey reversing the judgment of Superior Court of New Jersey, Appellate Division, and reinstating the contempt conviction of petitioner, is reported as In re Yengo, 84 N.J. 111, 417 A.2d 533 (1980).

JURISDICTION

The judgment of the Supreme Court of New Jersey reinstating the summary contempt conviction of petitioner was entered on August 4, 1980.

Petitioner has raised substantial questions regarding violation of the following constitutional protections through utilization of the summary contempt procedure authorized below:

1. Life, liberty and property without due process of law, contrary to the Fourteenth Amendment.

2. Privilege against self-incrimination as secured by the Fifth Amendment.

3. Right to public trial as secured by the Sixth Amendment.

Based upon the aforesaid violations, the jurisdiction of this court to review the actions of the Superior Court of New Jersey as affirmed by

the Supreme Court of New Jersey is conferred by 28 U.S.C., Section 1257(3).

Reliance is also placed upon 28 U.S.C., Section 2101 and Rules 17(b) and 17(c) of the Rules of The Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND OTHER AUTHORITES INVOLVED

This case involves the following provisions of the United States Constitution:

1. Amendment V - No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VI - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. Amendment XIV - Section 1 - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Additionally, reliance is placed upon the following authorities:

1. New Jersey Constitution (1947), Article I, Section 10 - In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

2. Federal Rules of Criminal Procedure, 42 (a) - Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

3. New Jersey Court Rule 1:10-1 - Contempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show cause. The order of contempt shall

recite the facts and contain a certification by the judge that he saw or heard the conduct constituting the contempt.

STATEMENT OF THE CASE

On March 6, 1978, the defendant, John W. Yengo, a member of the bar of the State of New Jersey, was adjudged by the Honorable Marilyn Loftus, J.C.C., to be in contempt of court. The finding of Judge Loftus was made pursuant to **New Jersey Court Rule 1:10-1** relating to contempts committed in the actual presence of the court, and stemmed from Mr. Yengo's absence from trial on March 3th and 4th, 1978.

The defendant, Yengo, was counsel of record for Leo Leone, in a criminal matter captioned as **State v. Errico, et al**, which matter was then being tried before Judge Loftus. On Thursday, March 3, 1978 and Friday, March 4, 1978, Mr. Yengo, due to other professional commitments, failed to appear at trial. Anticipating his absence on the aforementioned date, Mr. Yengo had discussed with the prosecutor, on at least three occasions, the scheduled order of witnesses. 22a. In reliance upon the representations of the prose-

cutor and his own anticipated trial strategy, Mr. Yengo secured substitute counsel to protect the rights of his client during his two-day absence. 10a.

Mr. Burns, the substitute counsel procured by the defendant, was an associate of Mr. Yengo in the practice of law. 11a. The utilization by defendant of Mr. Burns constituted more than the securance of the mere physical presence of counsel, in that Mr. Burns was familiar with the case (17a), and had previously reviewed the discovery. 12a. To assure Mr. Burns' familiarity with the status of the matter, Mr. Yengo undertook to brief his associate the prior evening and at the same time gave him an outline to assist him in the conduct of the trial. 13a.

The record clearly demonstrates that Mr. Leone, the defendant's cleint, was fully apprised of the fact that Mr. Yengo was absent (7a), and indeed gave his consent to his attorney's actions (9a). In addition to advising the prosecutor of

his intended absence (8a), Mr. Yengo garnered the assistance of co-counsel, who were to "stand in" for Mr. Yengo "and protect his client's interest." 9a.

The court made diligent inquiry of Mr. Burns as to his familiarity with the matter and ability to conduct Mr. Leone's defense. Being assured that the anticipated testimony was not chiefly directed toward Mr. Leone, and receiving assurance that Mr. Burns could adequately under take the duties of trial counsel, the court assented to the continuation of the trial. 19a. It is noted that at this point in time, there were no facts before the court concerning the reasons for Mr. Yengo's absence, or his intentions with regard to the same.

Despite the fact that the court agreed to continue the Errico trial, Mr. Yengo, upon his return to court on March 6, 1978, was adjudged to be in contempt of court. The record demonstrates that Mr. Yengo was not notified at the

commencement of proceedings against him as to the nature of the charges confronting him. Rather, the court without advising Mr. Yengo of his criminal jeopardy and without advising him of his privilege against self-incrimination proceeded to question him at length relative to the circumstances surrounding his absence. The defendant replied candidly to each of the court's questions and advised that other professional commitments had necessitated his sudden departure (22a). Despite Mr. Yengo's representation, the court adjudicated him guilty of contempt in facie curiae.

On April 14, 1978, the court pronounced sentence upon Mr. Yengo. While being cognizant of its power to incarcerate the defendant (43a), the court chose instead to impose a fine of $500.00 (44a), and to forward a copy of the transcript of these proceedings to the Hudson County Ethics Committee (44a).

Pursuant to **Rule 21(h)** of the Rules of the

Supreme Court of The United States, it is noted that the contempt conviction of petitioner was adjudicated by the Superior Court of New Jersey, Law Division, on a summary basis. Each of the issues raised infra, including all federal questions, were raised and briefed before both the Superior Court of New Jersey, Appellate Division and the Supreme Court of New Jersey. The written opinions of those courts are annexed hereto.

As used herein, "A-1" designates page one of the appendix hereto; "1a" refers to the appendix filed in the Superior Court of New Jersey, Appellate Division, which was also before the Supreme Court of New Jersey on the appeal to that court.

ARGUMENT

POINT I

SUMMARY ADJUDICATION OF CRIMINAL CONTEMPT IN FACIE CURIAE, PREMISED UPON THE ABSENCE OF AN ATTORNEY FROM TRIAL IS VIOLATIVE OF THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT, WHERE THE COURT CANNOT WITHOUT INQUIRY ASCERTAIN THE REASONS FOR THE ABSENCE.

Both within the federal system, and in New Jersey, it has been uniformly held, that obstruction of the administration of justice is the essence of contempt.

> "It is unfortunate that the use of the term 'contempt of court' has tended to convey the erroneous idea that punishment is to be imposed because of an affront to the personal dignity of the judge. The correct view of the nature of the offense which emphasizes the importance of the need to be served is found in the opinion of Lord Justice Salmon in **Morris v. Master of the Crown Office (1970) 2 W.L.R. 792, 801:**
>
> > ' The sole purpose of proceedings for contempt is to give our courts the power effectively to pro-

> tect the rights of the public by insuring that the administration of justice shall not be obstructed or prevented'."

United States v. Profitt, 498 F.2d 1124, 1128 (3rd Cir. 1974), cert. den. 419 U.S. 1002, 95 S.Ct. 320, 42 L.Ed. 2d 277 (1974). See also, N.J. Dept. of Health v. Roselle, 34 N.J. 331, 337, 169 A.2d 153, 158 (1961).

Under traditional distinctions, contempts have been classified as either civil or criminal. While appellate courts must look to the substance of the order violated, rather than its form, in determining whether a contempt is civil or criminal, sanctions which are imposed unconditionally strongly suggest a punitive purpose, and a criminal contempt, Shillitani v. United States, 385 U.S. 364, 368-370, 86 S.Ct. 1531, 16 L.Ed. 2d 622 (1966); United States v. Spectro Foods Corp., 544 F.2d 1175, 1182 (3rd Cir. 1976), while actions designed for the benefit of the other litigants, or to secure compliance with judicial decrees, are deemed civil in nature. Shillitani v. United

States, 384 U.S., supra at 368, citing Green v. United States, 356 U.S. 165, 197, 78 S.Ct. 632, 2 L.Ed. 2d 672 (1958) (Black J., dissenting). An examination of the record below demonstrates that the contempt attributed to petitioner is criminal in nature.

It is a well-settled principle of Anglo-American jurisprudence that criminal contempts are crimes or public wrongs in the ordinary sense, which require penal action to protect or vindicate the institutions of our government. Bloom v. Illinois, 319 U.S. 194, 201, 88 S.Ct. 1477, 20 L.Ed. 2d 522 (1968); Gompers v. United States, 233 U.S. 604, 610, 34 S.Ct. 693, 58 L.Ed. 1115, 1120 (1914). Under general precepts of criminal law, conduct will be considered contemptuous only if it is accompanied by a mens rea or willfulness. An act must be coupled with a state of mind calculated to interfere with the administration of justice for it to be deemed a contempt.

United States v. Delahanty, 488 F.2d 396, 398 (6th Cir. 1973); In re Niblack, 476 F.2d 930, 932 (D.C. Cir. 1973).

Both historically, and under modern concepts of justice, exercise of the contempt power has taken two forms. The more common and preferred approach, is a plenary trial, on notice, before a judge other than the one whose order has allegedly been violated. The more extreme approach, generally regarded with disfavor, is a summary adjudication of the offense. **Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952).**

While the Commentaries of Blackstone (2 Blackstone, "Commentaries on the Laws of England", p. 284 (1860)) and Fox (J. Fox, "The History of Contempt of Court, The Form of Trial and Mode of Punishment", Ch. 5, p. 49-50 (1972)) diverge regarding the scope of this historical power, it is apparent, even under the more expansive Blackstone analysis, that exercise of the

summary contempt power was limited at common law to those instances in which the contemptuous act was committed "in the face of the court."

Prior to the close of the 19th Century, United States courts recognized the potential for abuse and arbitrariness in the exercise of the summary contempt power and carefully distinguished those contempts which occurred within the view of the court from those which did not. Only as to the former classification was erosion of the traditional due process safeguards of notice, hearing and presentation of evidence, permissible. **Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888).**

Protection of procedural due process safeguards has been preserved by both federal and state court rule. Specifically, **F.R.Cr.P. (42a)** provides as follows:

> "(a) Summary disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was com-

> mitted in the actual presence of the court..."

See also, New Jersey Court Rule 1:10-1.

In Harris v. United States, 382 U.S. 162, 164, 86 S.Ct. 352, 15 L.Ed. 2d 240, 242 (1965), this court discussed the applicability of the summary contempt power, noting that it "was reserved for exceptional circumstances", Brown v. United States, 359 U.S. 41, 54 79 S.Ct. 539, 3 L. Ed. 2d 609, 619 (1959) (dissenting opinion), and limited to "misbehavior in the actual presence of the court." Ex parte Terry, 128 U.S., supra at 314; Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 69 L.Ed. 767 (1925). The need for immediate penal vindication of the authority and dignity of the court is a distinct but essential prerequisite to invocation of the summary contempt power. Only when the judge can certify that he or she saw or heard the conduct constituting the contempt and that there is a need for immediate action, may the judge utilize summary contempt power; those circumstances alone permit an ero-

sion of normal constitutional due process safeguards.

The dimensions of due process protection generally applicable to contempt proceedings were given expression in **Cooke v. United States, 267 U.S., supra at 537, 69 L.Ed. at 774,** where Chief Justice Taft, stated:

> "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

See also, In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 449, 92 L.Ed. 682 (1948).

Recognizing that the above-enumerated protections can only be abrogated upon the clearest showing of need, our courts have adopted a maxim of constitutional dimension: "Summary pun-

ishment always, and rightly, is regarded with disfavor." **Sacher v. United States, supra.** This precept is consistent with the fundamental due process premise that, "reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence." **In re Oliver, supra; Groppi v. Leslie, 404 U.S. 496, 502, 92 S.Ct. 582, 30 L.Ed. 2d 632 (1972).**

The foregoing constitutional principles and the narrow exception thereto, were summarized by Justice Black in **Oliver:**

> "Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the

> the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." **333 U.S. at 275, 92 L. Ed. at 695.** (emphasis supplied).

It is submitted that **Oliver** and its progeny clearly establish constitutionally permissible limits for summary adjudications of contempt. While this standard has been given applicability in myriad factual scenarios, this court has not, as yet, applied the foregoing principles to the absence of counsel at trial. It is respectfully urged, that the factual situation presented for review sub judice presents issues of constitutional dimension warranting discussion by this Court in the interests of uniformity, and for proper edification of the trial bench and bar.

As noted in the opinion of the Supreme Court of New Jersey below, **In re Yengo, 84 N.J.,**

supra at 124-125, 417 A.2d at 541 (1980), the majority view, among both federal and state courts, is that the absence of an attorney from trial is, at most, an indirect contempt. In this regard, attention is directed to the opinion of the Third Circuit in **Jessup v. Clark, 490 F.2d 1068, 1071 (3rd Cir. 1973)**, wherein it was reasoned that the failure of an attorney to appear for trial, was not "within the narrow range of conduct which may be punished summarily," in that it did not impede the orderly course of proceedings in progress, nor constitute an affront to the court before the general public.

The Court in **Jessup** focused upon the fact that while the Judge "saw" that the defendant-attorney was absent, such conduct did not constitute an act in the presence of the court warranting the invocation of the summary contempt power and the "elimination of normal due process protections." **490 F.2d at 1073; F.R.Cr.P. 42(a).** In reaching its determination, the Third Circuit

recognized the rule of law delineated in **Cooke, supra** and two later cases, **Harris v. United States, supra** and **Johnson v. Mississippi**, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed. 2d 423 (1971), each of which requires a demonstrated "need for immediate penal vindication of the dignity of the court" as a precondition to invoking the summary contempt power and eroding normal due process safeguards. **490 F.2d at 1071; see also, United States v. Pace**, 371 F.2d 810 (2nd Cir. 1967).

The Fourth Circuit in **United States v. Willett**, 432 F.2d 202 (4th Cir. 1970), relying on the precedent of this Court in **Nye v. United States**, 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 1172 (1941), reasoned that:

> "If a continued refusal to appear in court as scheduled does not constitute a direct contempt, the mere failure to appear cannot be a direct affront to the court even if the proffered explanation of a 'misunderstanding' is unacceptable. We hold the failure of Mr.

Willett to appear as scheduled, if contumacious, was not an act committed 'in the actual presence of the court,' and therefore not punishable summarily under **Rule 42(a)**.

Though not necessary for the purpose of this decision, we note that even if a failure to appear were found to be directly contumacious, it is questionable whether, under the circumstances of this case, summary punishment would be proper. Summary contempt power is one that 'always, and rightly, is regarded with disfavor.' **Sacher v. United States, 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed. 717 (1952)**. Such procedure should be used only to fill 'the need for immediate penal vindication of the dignity of the court." **Cooke v. United States, 267 U.S. 517, 536, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925)**. Prosecution upon notice and hearing under **Rule 42(b)** 'prescribes the 'procedural regularity' for all contempts in the federal regime except those unusual situations envisioned by **Rule 42(a)** where instant action is necessary to protect the judicial institution itself.' **Harris v. United States, 382 U.S. 162, 167, 86 S.Ct. 352, 355, 15 L.Ed. 2d 240 (1965)**. It does not appear that here the affront to the dignity of the court required 'immediate penal

> vindication' or that the facts constituted such an 'unusual situation' that summary action was required to 'protect the judicial institution itself'." 432 F.2d at 205.

It is urged that the conduct of petitioner in the instant matter was not of such nature as to constitute a direct contempt; with or without excuse or justification, such conduct was not committed "in the actual presence of the court" and did not require immediate penal action. This analysis has been given support in an uninterrupted line of federal and state court cases: In re Allis, 531 F.2d 1391 (9th Cir. 1976); United States v. Delahanty, supra; Peltier v. Peltier, __ R.I. ___ 388 A.2d 22 (1978); People v. McNeil, 42 IL. App. 3d 1036, 356 N.E. 2d 1073 (App. Ct. 1976); People v. Henry, 25 Mich. App. 45, 181 N.W. 2d 64 (Ct. App. 1970); Rogers v. Superior Court, 2 Ariz. App. 556, 410 P.2d 674 (App. Ct. 1966); State v. Winthrop, 148 Wash. 526, 269 P. 793 (1928). The "hybrid" concept developed by the Supreme Court of New Jersey, 84 N.J., supra

at 126, 417 A.2d at 541, is contrary to uniformly established decisional law emanating from **Cooke** and fails to comport with "the narrow exceptions for erosion of due process guarantees, as set forth in **Oliver.**

An application of the foregoing principals to the facts of the case sub judice demonstrates that the conduct of petitioner was neither "in the face of the court", nor did it require "immediate penal vindication." The record reflects that Mr. Yengo was not present on March 3rd and 4th, 1978 to participate at trial as attorney for Leo Leone, a defendant, in a criminal matter captioned as **State v. Errico, et al.** Despite the fact of the absence itself, it is clear that no contempt citation was issued by the court until March 6th, the date of Mr. Yengo's return. In essence, the adjudication on March 6, 1978, was an attempt by the court to retroactively determine that Mr. Yengo's prior absence constituted a contempt.

Assuming arguendo, that the non-appearance of petitioner was contemptuous, it is submitted that his conduct was not of such nature as to permit the trial judge to certify that she "saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." **F.R.Cr.P. 42(a); N.J. Court Rule 1:10-1.** At the commencement of proceedings on March 3rd, the sole fact objectively ascertainable to the court, was that Mr. Yengo was not present. Standing alone, such fact was insufficient to constitute a summary contempt, and it is apparent that even the trial judge did not adjudicate the contempt on this basis. It is equally apparent that prior to commencing its inquiries, the court was not aware of the factual basis for Mr. Yengo's absence, nor his intent with regard to the same.

While the initial inquiries by the court of co-counsel were justifiable in an attempt to learn the whereabouts of petitioner, it is urged that

the additional "investigation" undertaken by the trial judge demonstrated her inability to certify that she "saw the conduct constituting the contempt." Through extensive questioning, the court learned that Mr. Yengo would not be appearing for trial on either March 3rd or 4th; that his client consented to the absence; that the prosecutor and co-counsel had previously been consulted in this regards; and that substitute counsel had been procured. Cognizant of these facts, the court permitted the proceedings in progress to continue under the supervision of substitute counsel, Mr. Burns. It is again noted, that no contempt citation had been issued against Mr. Yengo at this point in time.

As the trial progressed, the court became increasingly concerned with the ability of Mr. Burns to competently conduct the defense of Mr. Leone. It is acknowledged that the court's concern in this regard was for the proper administration of justice. It is submitted however, that

the trial judge's perception of Mr. Burns' ability "colored" her view of the egregiousness of Mr. Yengo's absence.

Upon petitioner's return to court on March 6th. The court conducted an extended "question and answer" session with him. It is noted again, that no contempt citation issued until the conclusion of the interrogation session.

Based upon the foregoing, it is apparent that neither element of the "two-pronged" test has been established. First, the absence of defendant was insufficient in itself to constitute a contempt in that myriad reasons for such absence were possible. Accordingly, the court could not certify, without further inquiry, that the absence constituted a contempt.

In this regard, attention is directed to the following excerpt from this Court's opinion in **Groppi v. Leslie, supra,** where the effect of a two-day delay in adjudicating a legislative contempt was considered:

"We find little in our past decision that would shed light on the precise problem, but nothing to give warrant to the summary procedure employed here, coming as it did two days after the contempt. Indeed, we have stated time, and time again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence...

Even if it be assumed that courts and legislatures are analogous...the recorded cases dealing with the power of a court to impose summary punishment for contempt committed in its immediate presence show that such power has not ordinarily been exercised under conditions such as those here, with a lapse of two days following the event and without notice or opportunity for hearing of any kind. A legislature, like a court, most of necessity, possess the power to act 'immediately and instantly' to quell disorders in the chambers if it is to be able to maintain its authority and continue the proper dispatch of its business. Where, however, the contemptuous episode has occurred two days previously, it is much more difficult to argue that action without notice or hearing of any kind is necessary to pre-

> serve order and enable a legislative body to proceed with its business." **404 U.S. at 502, 504, 30 L.Ed. 2d at 638, 639** (citations omitted).

Secondly, it is clear that defendant was not cited for any violent or disruptive outburst causing an interruption in courtroom procedure, but rather for the mere fact of failure to appear. Under both federal and state court rule, such conduct is at most an indirect contempt, as to which petitioner's due process rights were preserved.

Based upon the foregoing, it is respectfully submitted that the conduct of petitioner did not constitute a contempt in facie curiae, and that the summary procedure utilized by the state trial court constituted an unconstitutional deprivation of petitioner's Fourteenth Amendment right to due process of law.

POINT II

THE INTERROGATION OF COUNSEL BY THE TRIAL COURT AS TO THE REASONS FOR COUNSEL'S ABSENCE FROM TRIAL, IS VIOLATIVE OF THE PRIVILEGE AGAINST SELF-INCRIMINATION SECURED BY THE FIFTH AND FOURTEENTH AMENDMENTS, WHERE THE ANSWERS ELICITED FORM THE BASIS FOR A SUBSEQUENT SUMMARY CONTEMPT ADJUDICATION, AND WHERE, A REFUSAL TO ANSWER THE INQUIRIES OF THE COURT CONSTITUTES A SUFFICIENT BASIS FOR A SUMMARY CONTEMPT ADJUDICATION UNDER LOCAL DECISIONAL PRECEDENT.

Under New Jersey decisional precedent, the unexplained absence or tardiness of counsel, coupled with a refusal to explain the reasons for the absence, or a wholly inadequate excuse therefore, constitutes a direct contempt of court, punishable in a summary manner. In re Clawans, 69 N.J. Super. 373, 174 A.2d 367 (App. Div. 1961), certif. den. 36 N.J. 296, 177 A.2d 340 (1962), cert. den. 370 U.S. 905, 82 S.Ct. 1250, 8 L.Ed. 2d 401 (1962); In re Yengo, supra at 126-127, 417 A.2d at 541; State v. Dias, 76 N.J. Super. 337, 340, 184 A.2d 535, 536 (App. Div. 1962). It is

respectfully submitted, that this precedent, insofar as it is dependent upon post-conduct inquiry of the alleged contemnor, is constitutionally deficient as violative of the Fifth and Fourteenth Amendments to the United States Constitution. Nevertheless, this was the "state of the law" in New Jersey at the time of the incident giving rise to the within proceedings.

A review of the chronology of events below, demonstrates that at no time prior to the protracted "question and answer" session between the court and petitioner on March 6th, was Mr. Yengo ever advised of his privilege against self-incrimination. **U.S. Constitution, Amend. V.** Indeed, the entire interrogation took place without any reference by the trial judge to a possible contempt citation, and without any forewarning by the court as to the purpose of the proceedings.

The record further reflects that petitioner candidly and forthrightly answered each of the

court's inquiries and that his responses were utilized by the court as a basis for adjudicating the contempt. The fundamental dilemma imposed upon Mr. Yengo by the above-delineated facts, and the affirmance of the contempt conviction in this context by the Supreme Court of New Jersey, is apparent. Had Mr. Yengo, after being absent from trial, refused to answers the questions posed by the trial judge, the court, under New Jersey law, was authorized to summarily adjudicate a contempt conviction. **In re Clawans, supra; State v. Dias, supra.**

On the other hand, under the precedent established by the decision in the instant matter, Mr. Yengo was effectively compelled to forfeit his Fifth Amendment self-incrimination and Fourteenth Amendment due process protections, and, by his own answers to the court's inquiries, was exposed to a summary contempt procedure. It is respectfully submitted that the quandry imposed upon petitioner under the state court determination is

antithetical to the safeguards secured through the United States Constitution, as interpreted and applied by the prior decisions of this Honorable Court.

As previously noted, with the possible exception of grand jury indictment and trial by jury, **Taylor v. Hayes, 418 U.S. 488, 498, 94 S.Ct. 2697, 41 L.Ed. 2d 897, 905-906 (1974)**, a defendant in a criminal contempt proceeding is entitled to the full panoply of substantive and procedural constitutional protections, including the privilege against compelled production of evidence and self-incrimination under the Fifth Amendment. **Maness v. Meyers, 419 U.S. 449, 461, 95 S.Ct. 584, 42 L.Ed. 2d 574, 585 (1975)**, citing, **Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 35 L.Ed. 1110 (1892)** and **Arndstein v. McCarthy, 254 U.S. 71, 72-78, 41 S.Ct. 26, 65 L.Ed. 138 (1920)**. Additionally, the constitutional dimension of this guarantee assures that the same is not waived merely because the defendant is an

attorney-at-law. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 47, 86 L.Ed. 680 (1942); State v. Stein, 70 N.J. 369, 386, 360 A.2d 347, 358 (1976).

Based upon the foregoing, it is respectfully submitted, that as applied to a summary contempt proceeding, the interrogation of counsel, by the trial court, as to the reasons for counsel's absence from trial, is unconstitutionally violative of the self-incrimination and due process safeguards secured by the Fifth and Fourteenth Amendments. It is further submitted, that where, as at bar, under local decisional precedent a refusal to answer the inquiries of the court constitutes a sufficient basis for an instanter contempt adjudication the procedures utilized by the court are all the more constitutionally egregious.

POINT III

PROMOTION OF JUDICIAL EXPEDIENCY AND FACILITY DOES NOT CONSTITUTE SUFFICIENT STATE INTEREST AS TO SUPERCEDE THE FIFTH AND FOURTEENTH AMENDMENT RIGHTS OF AN ATTORNEY QUESTIONED ABOUT HIS ABSENCE FROM TRIAL, WHERE THE ANSWERS ELICITED FORM THE BASIS FOR A SUBSEQUENT RETROACTIVE SUMMARY CONTEMPT ADJUDICATION.

In concluding that "strict" compliance with the requirement of referring absent attorneys to another judge may not be in the interests of the judiciary, attorneys, or the public", the Supreme Court of New Jersey afforded great significance to the notions of judicial expediency and facility, and the need to avoid needless waste of time." **In re Yengo, 84 N.J., supra at 127-128, 417 A.2d at 542.** In the final analysis, these counterveiling considerations were given precedence over the need to safeguard the constitutional rights of the defendant. This fact is evidenced by the following excerpt from the opinion below:

> "The need for immediate adjudication and punishment outweighs the procedural safe-

> guards that would ensue from referring the matter to another judge." 84 N.J. at 127, 417 A.2d at 542.

Under both constitutional mandate and decisional precedent, the state's interest in judicial expediency and facility does not rise to such level as to supercede the fundamental constitutional basis for requiring notice and a plenary hearing before a neutral judge as a precondition to any adjudication of contempt. Where, as here, there is no violent outburst or other impediment to the orderly continuation of proceedings in progress, there is no permissible basis for eroding individual protections and dispensing with normal due process safeguards. Groppi v. Leslie, 404 U.S., supra at 502, 30 L.Ed. 2d at 637, 638; Harris v. United States, 382 U.S., supra at 166-167, 15 L.Ed. 2d at 243; United States v. Pace, supra at 811. The rationale of the court below, equating a hearing "before the offended judge" with a hearing before a detached judge, is inimicable to the guarantees constitutionally secured to indi-

vidual defendants. As this court noted in an analogous context:

> "We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries...We do not deny that serious punishment must sometimes be imposed for contempt, but we reject the contention that such punishment must be imposed without the right to jury trial. The goals of dispatch economy, and efficiency are important, but they are amply served by preserving the power to commit for civil contempt and by recognizing that many contempts are not serious crimes but petty offenses not within the jury trial provisions of the Constitution. When a serious contempt is at issue, considerations of efficiency must

> give way to the more fundamental interest of ensuring the even-handed exercise of judicial power. In isolated instances recalcitrant or irrational juries may acquit rather than apply the law to the case before them." **Bloom v. Illinois, 20 L.Ed. 2d, supra at 532-533.**

See also Mayberry v. Pennsylvania, 400 U.S. 455, 464, 91 S.Ct. 499, 27 L.Ed. 2d 532, 539 (1971).

As previously noted, the record reflects that no contempt was adjudicated until Mr. Yengo's return on March 6th, some two days after the conduct allegedly giving rise to the contempt. While, as argued in Point I, **supra**, this sequence demonstrates the absence of a need to deal instanter with petitioner's actions, it also highlights the inappropriateness of the New Jersey Supreme Court's reliance on "expediency and facility" to justify the actions taken by the trial judge. As noted by this Court in **Taylor v. [illegible]yes, 418 U.S., supra at 497, 41 L.Ed. 2d at 907:**

> "...where conviction and punishment are delayed, 'it is much more difficulty to argue that action without notice or

> hearing of any kind is necessary to preserve order and enable (the court) to proceed with its business."

Attention is also directed, by analogy, to the following excerpt from this Court's opinion in **Mayberry v. Pennsylvania, supra** where the preferred practice for adjudication of contempt is set forth:

> "All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure the public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place." **400 U.S. at 464; 27 L.Ed. 2d at 539.**

In summary, it is submitted that in the normal course, and upon the facts at bar, the need for judicial expediency and facility cannot preempt an individual's right to due process of law. Further, such considerations do not permit a court to make inquiry of said individual without prior notice of the nature of the proceedings,

in abrogation of the Fifth Amendment's protection against self-incrimination.

POINT IV

CONDUCT OF AN IN CAMERA SUMMARY CONTEMPT PROCEEDING, WITHOUT NOTICE, INDEPENDENT COUNSEL AND FIFTH AMENDMENT SELF-INCRIMINATION WARNINGS, VIOLATES THE RIGHT TO A PUBLIC TRIAL AS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is a fundamental constitutional precept, both under the United States and New Jersey constitutions, that in a criminal prosecution, an accused is entitled to a public trial. Specifically, the Sixth Amendment guarantees that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed."

See also, Article I, Section 10 of the 1947 New Jersey Constitution.

While the right to a jury trial in certain instances, most notably petty offenses, has been held not to be of constitutional magnitude, the same may not be said of the right to a public trial. With regard to criminal contempt proceed-

ings, this court noted In re Oliver, supra, 333 U.S. at 266, 92 L.Ed. at 690, that:

> "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. Summary trials for alledged misconduct called contempt of court have not been regarded as an exception to this universal rule against secret trials..." (emphasis supplied).

In Oliver, the court traced the historical development of the right to public trial, and concluded:

> "In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison."

An alternate expression of this central proposition was set forth in **Mayberry v. Pennsylvania, 400 U.S. supra at 466, 27 L.Ed. 2d at 540,** where, relying upon **Oliver**, the court reasoned:

> "Our conclusion is that by reason of the due process clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor."

Upon the facts of the case at bar, it is apparent that the defendant was not afforded his right to a public trial. The record reflects that the trial judge cleared the courtroom of all individuals except the defendant and designated court personnel prior to the commencement of her interrogation of Mr. Yengo (22a). In fact, the defendant, without prior notice or opportunity to prepare a defense, was isolated behind closed doors, without the benefit of counsel. It is exactly this type of prosecution which is abhorent to the guarantee of public trial, and which is forbidden constitutionally, by court rule and by case law.

It is further submitted that the nature of the instant matter, that is, a summary contempt proceeding, wherein the courts sits at once as accuser, prosecutor and trier of law and fact, makes the aforementioned guarantees all the more essential. Accordingly, the manner in which the proceedings under review were conducted warrants a dismissal of the order of judgment entered below in that the defendant's right to a public trial and was entirely abrogated.

POINT V

UTILIZATION OF SUBSTITUTE COUNSEL BY THE ATTORNEY OF RECORD AT TRIAL, WITH THE CONSENT OF THE CLIENT BUT WITHOUT PRIOR NOTICE TO THE COURT, MAY NOT CONSTITUTE THE BASIS FOR A SUMMARY CONTEMPT ADJUDICATION.

As previously argued, interference with the proper administration of justice is the essence of the offense of contempt. **United States v. Proffitt, supra.** Such interference must be accompanied by a mens rea or willfulness, as only then does it sufficiently challenge the authority of government. **United States v. Delahanty, supra.**

An examination of the facts sub judice demonstrates that petitioner was not possessed of the requisite mens rea necessary to establish a contempt of court. The record reveals that while defendant may have been remiss and unprofessional in failing to inform the court about his conflicting professional commitments, this failure was not motivated by any scorn or disdain of the court's authority, nor did it result in any hindrance or impediment to the orderly continuance

of proceedings in progress.

Petitioner's client, Mr. Leone, was fully apprised of Mr. Yengo's anticipated absence and indeed gave his consent to it. This action, insofar as it did not intentionally disrupt the continuation of the trial, was consistent with Mr. Leone's right to consent to utilization of associate counsel, and also consistent with procedures previously condoned by the trial court.

An examination of the record below clearly demonstrates that the February 14, 1978 directive of the trial court was not an admonition to counsel prohibiting their personal absence from trial even upon procurement of substitute counsel, but rather a request that the matter be ready to proceed at such time as the court might advise (14a). The concern expressed by Judge Loftus related solely to her fear that counsel might become engaged in another matter before another judge (8a); and was not a verbal prohibition against the utilization of an appropriate substitute should

the need for the same arise. Indeed, the record reflects that on a regular basis the trial court permitted counsel to "cover" for each other.

Specifically, on February 23, 1978, the court, although aware that Mr. Russell would be late, heard argument on a motion that was of interest to his defense strategy. (59a). The court did not comment upon Mr. Russell's failure to appear at that time, nor was he cited for any violation of the rules, despite the fact that he did not appear until some time later (60a). Unlike the sub judice, Mr. Russell's client did not consent to his absence (60a) and no substitution was procured.

The transcript of proceedings for February 28, 1978 is of particular interest. At that time, the court was informed that Mr. Claudat was not present and that his whereabouts were unknown to his fellow counsel (61a). Acting upon its own initiative and suggestion, the court requested that Mr. Malfitano "cover" for Mr. Claudat and

proceeded with the conduct of the trial on this basis (61a). At the same time, the court was informed of the absence of Mr. McAlevy (62a). Despite the fact that Mr. Cammarata advised Judge Loftus that he had no specific authority to stand in for Mr. McAlevy, the court consented to a temporary substitution without further comment (62a). Further, the court permitted Mr. Cammarata to cover for Mr. Coyle who also was absent at that time (62a). In short, the court sanctioned, without prior notice, the substitution or "covering" by co-counsel for several of their absent colleagues.

Finally, the March 14, 1978 transcript of proceedings again indicates a request on the initiative of the court that one counsel "cover" for another. Specifically, the court requested that Mr. McAlevy stand in for Mr. Claudat (64a). At that same time, Mr. Cammarata was permitted to substitute for Mr. Russell (64a).

Despite the fact that the court had per-

mitted considerable "covering" or substituting by the counsel involved with the conduct of the **Errico** trial, it failed to extend the same right to petitioner. Acting in reliance upon the procedures heretofore established and permitted by the trial judge, Mr. Yengo procured the appearance of a substitute attorney when it became apparent to him that he would not be present. While acknowledging that he had made a mistake in failing to apprise the court of his absence, Mr. Yengo noted his belief that he had acted appropriately and had sought to protect his client's interest in securing the presence of Mr. Burns (27a). Despite Mr. Yengo's apparent justification of his conduct, Judge Loftus cited him for contempt of court in facie curiae.

The record demonstrates that throughout the **Errico** trial the court did not view the repeated "substitutions" of counsel for their absent colleagues as contemptuous in nature. It is further submitted that the applicable case law would

not permit a finding of contempt in such instances. The conduct of the defendant in procuring a replacement who was not burdened by his representation of another litigant, demonstrated a concern for the orderly conduct of matters in progress, and belies a finding of contempt. The procedure utilized by the defendant evidenced his desire to preserve the authority and dignity of the court and did not demonstrate a state of mind calculated to interfere with the administration of justice.

CONCLUSION

It is submitted that the decision of the Supreme Court of New Jersey is in conflict with federal decisional precedent as more particularly set forth in Point I (summary adjudication of contempt); Point II (privilege against self-incrimination) and Point IV (Right to a public trial); and that the state court has decided an important question of federal law not previously settled by this Court. It is therefore respectfully submitted that special and important reasons exist for the granting of a writ of certiorari in the matter sub judice.

Respectfully submitted,

MARGULIES & MARGULIES,
P.A.
Attorney for Petitioner

By: Raymond R. Wiss

Dated: November 3, 1980

APPENDIX

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-78 September Term 1979

IN THE MATTER OF

JOHN W. YENGO, ESQ.,

Charged with Contempt.

Argued December 11, 1979 -- Decided August 4, 1980

On certification to the Superior Court, Appellate Division, whose opinion is reported at 167 N.J. Super. 66 (1979).

Erminie L. Conley, Assistant Attorney General argued the cause for appellant State of New Jersey (John J. Degnan, Attorney General of New Jersey, attorney).

Raymond R. Wiss argued the cause for respondent John W. Yengo, Esq. (Seymour Margulies, attorney).

The opinion of the Court was delivered by

POLLOCK, J.

APPENDIX A

The primary issue on this appeal is whether the unexcused absence of an attorney from a trial constitutes contempt in the presence of the court justifying summary disposition under R. 1:10-1.

The trial judge concluded that the absence of the attorney constituted direct contempt in the presence of the court and disobedience of a court order prohibiting involvement in other proceedings. She found him guilty of contempt and imposed a $500 fine. The Appellate Division reversed and remanded, concluding that the offense was an indirect contempt requiring notice and hearing in accordance with R. 1:10-2 to 4. 167 N.J. Super. 66 (1979). We granted certification. 81 N.J. 333 (1979). We now reverse the judgment of the Appellate Division and reinstate the judgment of conviction entered by the trial court.

I

Respondent, John W. Yengo, represented Leo

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Leone, one of ten defendants in a multiple defendant gambling conspiracy trial. The nature of the case, the number of defendants and their counsel, together with the complexity of the evidence, presented difficult trial problems. The intricate proofs, which included wiretaps or monitored telephone conversations by court-authorized electronic surveillance, made attorney attendance throughout the trial a matter of highest priority. Both court and counsel recognized the special problems inherent in the management of the case. For example, 18, rather than 12, jurors were impaneled. The trial was estimated to last for five weeks. Those difficulties were compounded by an influenza epidemic and a major snowstorm. Because of bad weather, the scheduled trial date was postponed three times.

Anticipating scheduling difficulties among the numerous defense attorneys, the judge stressed the need for regular attendance. She instruc-

ted counsel that she would not tolerate tardiness or absence without her prior approval. On February 8, 1978, she pointedly advised counsel:

> Now you are considered on trial before me ... [Y]ou are to advise all other courts and all other judges that you are on trial before me. If you have any problem with any judge, you let me know ... So, don't get involved in any other case or trial ...

On February 14, the judge again emphasized the importance of punctuality:

> Now, I just want to advise you that it is my intention to move this case along as rapidly as I can. The case itself has enough problems involved with the law involved in it without us having practical problems on a day-to-day basis with regard to time and otherwise...
>
> However, I am putting you all on notice that I intend, once we get going with this case, to abide by the time restrictions on this case. All of you have got to be here at 9 o'clock because I am going to be out on the bench at 9 o'clock. I intend to impose sanctions on any attorney who is not here on time. The Assignment Judge of

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Essex County comes from Jersey City and Hudson County and if he can get here by 8:15 in the morning, you people can get here on time.

So, all of you get yourselves here on time as we move throughout the case, and I am just giving you notice, that there will be sanctions including considerations of the cost of the inconvenience of jurors, the costs of the court staff being here, the inconvenience to all the other attorneys involved in the case, problems relating to delay of witnesses and such.

As for your clients, most of them are here. I want to advise all of you that you are to make appropriate arrangements to get yourselves here on time. I intend to proceed with the case and move along with the case in accordance with the time restrictions and if you are not here, I will consider you to have voluntarily absented yourself.

So, what I am asking from you is your cooperation in telling you I am going to give you every consideration I can under the circumstances, but because of the nature of the case, the number of attorneys, the number of defendants, we have to be strict with

> regard to the time requirements. I intend to impose those and if they are violated, I will impose sanctions.

Yengo was not only aware of the instructions, but on February 22 he requested Judge Loftus to call another judge before whom he had a matter pending.

Testimony began on February 21, and Yengo appeared regularly until March 2. On that date, without previously informing the judge, he failed to appear at trial. Although Yengo failed to notify the court of his planned absence, he had discussed the matter with the prosecutor, several of the other defense attorneys and his client. In his place, Lawrence Burns, an attorney admitted to practice in 1975, appeared on behalf of Leone. Burns shared office space with Yengo, received cases from him, and described himself as Yengo's associate. Burns arrived late for the trial.

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Leone advised the court that he consented to representation by Burns in Yengo's absence. Earlier Leone had consented to representation by Kenneth R. Claudat, another defense attorney, to "protect his interest" until Burns arrived.

The trial judge acknowledged Burns' authorization to represent Leone, and heard testimony of the State's wiretap monitor witness until lunch time. Following the initial hour of testimony, Judge Loftus became concerned about the extent of Burns' knowledge of the case. During the lunchtime recess, the judge questioned Burns in her chambers about Yengo's absence. Burns stated he did not know why Yengo had failed to obtain court approval for his absence, why he was absent, or where he had gone.

In response to questions from the court, Burns informed the judge that Yengo had called Burns at 9 o'clock the preceding evening to advise that he was going out of the country.

Burns stated further that he had reviewed the file with Yengo for 15 minutes at 11:00 p.m. on that evening and that previously he had spent two days reviewing the file and discussing it with Yengo.

The trial proceeded with Burns acting as counsel for Leone. Judge Loftus tried several times to locate Yengo through calls placed by her secretary to his answering service. Judge Loftus also called Yengo's home and spoke with his daughter, who told the judge that Yengo had gone to Bermuda on a four day vacation and would return on Sunday, March 5. However, the daughter was unable to inform the court where Yengo was staying in Bermuda.

The trial court concluded that she had no alternative but to let the trial continue. The other attorneys stated that the testimony that would be adduced during Yengo's absence would not relate to Leone. Although the court ex-

pressed concern that an expert witness for the State might testify before Yengo returned, the trial continued uninterrupted through Friday, March 3.

The judge did not issue a citation for contempt on March 2 or March 3, the days on which Yengo was absent. Instead, she sent a telegram to his home ordering and directing him to appear before her at 9:00 on Monday, March 6, 1978, the next trial date.

On that date, Yengo appeared in court. The trial judge cleared the courtroom, except for court personnel and Yengo. He explained that he had been in Bermuda on business for a supermarket. He stated that he did not communicate with the court because he did not know if he would be going to Bermuda until late Wednesday, March 1. He also explained that, as a matter of trial strategy, he had decided not to cross-examine the monitor witness from the State.

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In the course of the colloquy with the court, the trial judge stated:

> I called you here this morning and gave you the opportunity to speak because I thought that maybe the information that had come to my attention by the various phone calls I had to make, that you had gone to Bermuda for the weekend, was wrong. I thought maybe there was even some kind of explanation for it ...but that is not so. There is absolutely no emergent necessity for you to leave this Country and go to Bermuda. Your actions just bespeak nothing but irresponsible professional conduct toward your client and towards this court.

She then cited him for contempt in the presence of the court and stated he would be "dealt with further at another time with regard to the disposition of this particular citation."

On April 14, 1978, Yengo appeared before Judge Loftus. She affirmed the determination of contempt and imposed a fine of $500. In her certification on April 21, 1978, the trial court stated:

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> The action of John Yengo, Esq., in going to Bermuda for two court days in the third week of a five-week, complex wiretap gambling conspiracy case with ten defendants and a seventeen-member jury without prior notice and approval of the Court and without leaving word as to where he could be reached, constituted a disruption in the Court proceedings, disobedience of the Court order prohibiting involvement in other proceedings, a lack of respect for the Court, a lack of professional responsibility, as well as conduct prejudicial to the administration of justice.

The certification concluded by stating that Yengo was adjudged guilty of contempt in the presence of the court on March 6, 1978. See R. 1:10-1.

II

The law of contempt is derived from statutes, rules of court, and judicial decisions. In general, contempt includes disobedience of a court order or misbehavior in the presence of the court by any person or misbehavior by an officer of

the court in his official transactions. N.J.S.A. 2A:10-1. The essence of the offense is defiance of public authority. In re Contempt of Carton, 48 N.J. 9, 20 (1966); N.J. Dept. of Health v. Roselle, 34 N.J. 331, 337-338 (1961).

A defendant is entitled to certain safeguards accorded criminal defendants. Those safeguards include the presumption of innocence, the privilege against self-incrimination, the right of cross-examination, proof of guilt beyond a reasonable doubt, and the admissibility of evidence in accordance with the rules of evidence. In re: Ruth M. Buehrer et al, 50 N.J. 501, 516 (1967); In re Contempt of Ungar, 160 N.J. Super. 322, 332 (App. Div. 1978); State v. Jones, 105 N.J. Super. 493, 498-499 (Cty. Ct. 1969). However, there is no constitutional right to indictment or trial by jury in every summary criminal contempt proceeding. In Re: Buehrer, supra, 50 N.J. at 518; N.J. Dept. of Health v. Roselle, supra, 34 N.J.

at 338-339.

This Court has held that a contempt punishable by not more than six months in prison or a fine of $1,000 or both may be prosecuted without indictment or trial by jury. In Re: Buehrer, supra, 50 N.J. at 522. In reaching that conclusion, Chief Justice Weintraub reasoned that, under the New Jersey and United States Constitutions, there is no right to indictment or trial by jury for petty offenses. He stated that a six months' sentence was not excessive and that it was "debatable" whether a jail term for one year was excessive. Id. at 519. He referred to disorderly persons offenses as one type of petty offense and noted that the penalty for a disorderly persons offense was one year in jail or $1,000 or both. Id. More recently, the New Jersey Code of Criminal Justice, effective in 1979, established classes of offenses known as disorderly persons offenses and petty disorderly persons offenses,

both of which are petty offenses, not crimes. **N.J.S.A. 2C:1-4.** The maximum sentence is six months in jail and $1,000 in the case of a disorderly persons offense or 30 days in jail and a $500 fine in the case of a petty disorderly persons offense. **N.J.S.A. 2C:43-3,8.**

Notwithstanding the legislative changes since **Buehrer,** we affirm the conclusion that there is no right to indictment and trial by jury in a summary criminal contempt proceeding where punishment does not exceed six months' imprisonment or a fine of $1,000 or both. We reach that conclusion without setting the "outer limits of punishment." **In Re: Buehrer, supra, 50 N.J. at 519.** Since respondent received a fine of $500 without a jail term, he did not have a right to trial by jury in his contempt proceeding. Although not necessary to the preceding result, we note that respondent did not request a jury trial in the proceedings before the trial court, but

sought for the first time on appeal reversal on the theory that he had been denied the right to trial by jury.

III

Where the conduct of an attorney disrupts the orderliness of a trial, the speed with which a court should respond depends on the offensiveness of the lawyer's conduct and the need to assure the continuity and fairness of the proceeding. See In re Contempt of Carton, supra, 48 N.J. at 21.

When the contempt is in the presence of the court, the judge may act summarily without notice or order to show cause. R. 1:10-1. On other occasions, the proceedings shall be on notice and on an order for arrest or an order to show cause. R. 1:10-2. In addition, the matter may not be heard by the judge allegedly offended, except with the consent of the person charged. R. 1:10-4.

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The reasons for notice and hearing for a contempt occurring outside the presence of the court "are, first, that there is no need to deal so abruptly with an offense which does not constitute an obstruction within the courtroom itself, and second, that since the court does not know by its own senses all of the facts constituting the offense, there must be a trial to adduce them." In re Contempt of Carton, supra, 48 N.J. at 22.

That rationale is consistent with a dual test established by the United States Supreme Court to determine the justification for the exercise of summary contempt powers: (1) the act or omission must occur in the presence of the court so that no further evidence need be adduced for the judge to certify to the observation of the contumacious behavior and (2) the act must impact adversely on the authority of the court. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). See Cooke v. United States, 267 U.S.

517, 45 S.Ct. 390, 69 L.Ed. 767 (1925); Ex Parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 408 (1888).

Both this Court and the United States Supreme Court have demonstrated sensitivity to the potential for abuse in summary contempt proceedings. The United States Supreme Court has stated that summary contempt powers should be limited to the "least possible power adequate to the end proposed." Harris v. United States, 382 U.S. 162, 165, 86 S.Ct. 352, 354, 15 L.Ed. 2d 240, 242 (1965). That limitation has been followed in New Jersey as well as in federal and other state courts. N.J. Dept. of Health v. Roselle, supra, 34 N.J. at 343. See Jessup v. Clark, 490 F.2d 1068 (3d Cir. 1973); United States v. Delahanty, 488 F.2d 396 (6th Cir. 1973); United States v. Willett, 432 F.2d 202 (4th Cir. 1970); Lyons v. Superior Court, 43 Cal. 2d 755, 278 P.2d 681 (Sup. Ct. 1955); Peltier v. Peltier,

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__R.I.__, 388 A.2d 22 (1978).

Since the power to punish directly inevitably diminishes the procedural due process accorded to the alleged contemnor, the power must be permitted only where necessary. Harris, supra, 382 U.S. at 165, 86 S.Ct. at 354, 15 L.Ed.2d at 242. If proof of the contempt depends on evidence from persons other than the judge, the better practice is to proceed on order to show cause even where the contempt is in the face of the court. Swanson v. Swanson, 8 N.J. 169, 184 (1951). That procedure comports more closely with concepts of procedural due process and eliminates unseemly confrontations between the court and the contemnor. See, e.g., State ex rel Wendt v. Journey, 492 S.W.2d 861, 864 (Mo. App. Ct. 1973).

IV

The critical question is whether an unex-

cused absence of an attorney should be classified as a direct or indirect contempt for procedural purposes. The essence of a direct contempt, or contempt in the face of the court, is conduct that a judge can determine through his own senses is offensive and that tends to obstruct the administration of justice. R. Goldfarb, **The Contempt Power at 68 (Colum. Univ. Press 1963)(Goldfarb).** Generally a disruptive act in the presence of the court, such as the use of offensive words or conduct, is a direct contempt. **State v. Gonzalez, 134 N.J. Super. 472, 475 (App. Div. 1975), affirmed in part and modified in part 69 N.J. 397 (1976).**

However, an act may be a direct contempt although it is not committed in the presence of the court. **In re Caruba, 139 N.J.Eq. 404, 421 (Ch. 1947), aff'd 140 N.J.Eq. 563 (E. & A. 1947), cert. den. 335 U.S. 846, 69 S.Ct. 69, 93 L.Ed.**

396 (1948). Examples include: threatening letter from an attorney to the clerk in chancery, In re Jenkinson, 93 N.J.Eq. 545 (Ch. 1922); assault on one incorrectly thought to be a witness, In re Hand, 89 N.J.Eq. 469 (Ch. 1918); letter from father of husband in divorce proceeding to wife and threats to her attorney, In re Bowers, 89 N.J.Eq. 307 (Ch. 1918); sending an abusive letter to the ordinary abusing a judge of the probate court, In re Merrill, 88 N.J.Eq. 261 (Prerog. 1917). More recent examples include: letter from recipient of parking ticket to clerk of municipal court containing obscenities and alleging "ugly" methods of collecting money, State v. Sax, 139 N.J. Super. 157 (App. Div. 1976), certif. den. 70 N.J. 525 (1976); letter to judge from recipient of traffic ticket alleging he would not receive a fair trial, State v. Gussman, 34 N.J. Super. 408 (App. Div. 1955).

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A useful definition of indirect contempt is even more difficult to find. One writer suggests: "Probably the only all-embracing and accurate definition of indirect contempt is that it is composed of all contempts that are not direct." Goldfarb at 70. Stated otherwise, an indirect contempt "is an act committed not in the presence of the court, but at some distance therefrom." In re Bozorth, 38 N.J. Super. 184, 188-189 (Ch. Div. 1955); cf. Van Sweringen v. Van Sweringen, 22 N.J. 440 (1956)(by telling a co-respondent in a divorce case that he could obtain a favorable decision for money, an attorney committed criminal contempt outside presence of the court which reflected on the integrity of the judge, who should have disqualified himself).

By itself, the unexplained absence of an attorney from a courtroom is an enigma. It demands an explanation. Aside from the unlikely event of complete disappearance of an attorney,

the absence will be followed, as here, by a subsequent appearance before the court. At that time, the court invariably will ask for an explanation from the attorney. Generally, the absence alone does not constitute contempt. An essential element of the offense is the inadequacy of the explanation. Jessup, supra, 490 F.2d at 1072; Roselle v. State, 509 P.2d 486, 488 (Okla. Ct. Crim. App. 1973). As Justice Traynor has written, "The absence of a valid excuse is an indispensable element of the contempt." Chula v. Superior Court, 57 Cal.2d 199, __, 368 P.2d 107, 113, 18 Cal. Rptr. 507, 513 (Sup. Ct. 1962)(dissent).

Although we have not determined when the absence of an attorney is a direct contempt, the Appellate Division has held that an unexplained absence or tardiness together with a refusal to explain or a wholly inadequate excuse will constitute a direct contempt. In re Clawans, 69 N.J.

Super. 373 (App. Div. 1961), certif. den. 36 N.J. 296 (1962), cert. den. 370 U.S. 905, 82 S.Ct. 1250, 8 L.Ed.2d 401 (1962), involved two separate contempts. The first consisted of insulting statements in open court about the trial judge, and the second, which occurred several months later, was a flat refusal to explain her absence. In State v. Dias, 76 N.J. Super. 337, 340 (App. Div. 1962), the defendant-attorney gave a "wholly inadequate excuse" for his tardiness in appearing at a peremptorily scheduled hearing. On appeal, he did not deny that the alleged contempt was one that occurred in the presence of the court.

Federal courts and other state courts have divided on the issue, but the majority view is that an attorney's unexcused absence is not contempt in the actual presence of the court. The rationale is that, although the absence or late arrival of an attorney can be perceived directly

by the court, the conclusion that the absence is inexcusable requires reference to facts not immediately within the court's perception. Among the state courts, see, e.g., **Lee v. Bauer, 72 So.2d 792 (Fla. Sup. Ct. 1954)**(attorney who sent substitute to pretrial conference should have had an opportunity to explain his reasons for not attending personally); **Peltier, supra** (citing **In re Clawans, supra**, the court held that an attorney who failed to appear committed an indirect contempt); **State v. Winthrop, 148 Wash. 526, 269 P. 793 (1928)**(reversal of conviction of contempt of attorney whose case was dismissed when he left courtroom for an hour when case was not reached for trial promptly); **Rogers v. Superior Court, 2 Ariz. App. 556, 410 P.2d 674 (App. Ct. 1966)** (attorney's failure to appear because juvenile court attache said attendance was superfluous was an indirect contempt); **People v. McNeil, 42 Ill. App. 3d 1036, 356 N.E.2d 1073 (App. Ct.**

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1976)(attorney of record who sent associate to try case was not guilty of even an indirect contempt when the associate went to the wrong courtroom); **People v. Henry, 25 Mich. App. 45, 181 N.W.2d 64 (Ct. App. 1970)**(attorney who did not appear on date for criminal trial or for oral argument before appellate court was guilty of contempt); **State ex rel Wendt, supra** (although attorney did not appear after court denied his request for continuance and judge proceeded on order to show cause, judge should have disqualified himself); **Roselle v. State, supra** (tardy appearance of an attorney who was fifteen minutes late is a "hybrid situation" requiring a separate hearing before another judge to determine if defendant was willfully tardy); **contra, Chula, supra** (failure of attorney to appear without sufficient reason constitutes direct contempt); **Lyons, supra** (attorney who was habitually late for proceedings and had been late twice in the trial of the same case

guilty of contempt); **Kandel v. State, 252 Md. 688, 250 A.2d 853 (Ct. App. 1969)**(failure of attorney to appear punctually at trial constituted contempt and was properly punished summarily).

As with the state courts, the majority view among the federal courts is to treat the absence of an attorney as an indirect contempt. See **In Re Allis, 531 F.2d 1391 (9th Cir. 1976)**(mere absence from courtroom is not contempt); **Jessup, supra** (failure to appear in federal court due to alleged conflict with state court trial did not require summary punishment); **Delahanty, supra** (attorney's unexplained absence from pretrial conference did not occur in the actual presence of the court so as to justify summary disposition); see also **Willett, supra,** (failure to appear as scheduled not a direct contempt); **contra, In Re Gates, 478 F.2d 998 (D.C. Cir. 1973)**(attorney who failed to appear in the United States District Court because of hearing before magistrate is

guilty of contempt); In Re Niblack, 476 F.2d 930 (D.C. Cir. 1973)(conviction of contempt sustained against attorney who had been warned frequently about tardiness and appeared two hours late).

We conclude that the mere unexplained absence of an attorney is a hybrid. Roselle v. State, supra, 509 P.2d at 488; Chula, supra, 368 P.2d at 112. In fashioning the appropriate judicial response, we adhere to our prior declaration that the summary contempt power should be exercised sparingly. N.J. Dept. of Health v. Roselle, supra, 34 N.J. at 343. However, we recognize also that strict compliance with the requirement of referring absent attorneys to another judge may not be in the interests of the judiciary, attorneys, or the public. Time would be wasted needlessly if, after observing the absence of an attorney, a judge could not ask, "Where were you?" The answer to that question frequently will obviate the need for further proceedings.

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Preclusion of the inquiry would prevent any dialogue between court and counsel on an issue that might be resolved without complicated proceedings. The characterization of the contempt as direct or indirect should be deferred until after the attorney has an opportunity to explain his absence.

V

If there is an adequate explanation, the matter should proceed no further. However, if the attorney refuses to explain, the judge may treat the offense as a direct contempt. See **In re Clawans, supra.** Both the absence and the refusal are in the presence of the judge, who may determine the matter summarily. Similarly if the attorney offers an insulting, frivolous, or clearly inadequate explanation, both elements of the offense are in the presence of the judge, who may treat the matter as a direct contempt. See **Dias, supra.** Of equal importance the refusal to ex-

plain or an offensive explanation creates the need in the court to deal immediately with the matter. **In re Carton, supra, 48 N.J. at 21.** The need for immediate adjudication and punishment outweighs the procedural safeguards that would ensue from referring the matter to another judge. In both instances, the attorney has a right to a hearing, albeit before the offended judge. The hearing is limited to proof of facts, legal argument, and the right of allocution. Id. See **In re Logan, Jr., 52 N.J. 475, 477 (1968)**(in a summary contempt proceeding against an attorney for conduct during trial, the attorney should be given an opportunity to dispel any possible misunderstanding or to present exculpatory facts).

If there is some evidence of the adequacy of the explanation, the judge should characterize the matter as an indirect contempt and proceed by order to show cause returnable before another judge. R. 1:10-2,-4. The semblance of adequacy

dilutes the offensiveness of the explanation and diminishes the need for dealing instantly with the offense. If the proffered explanation may require proof of facts occurring outside the presence of the court, the better practice is to proceed before another judge. Furthermore, referral to another judge eliminates the potential for bias, or at least the appearance of bias. The suggested procedure is consistent with our recent observation that, "In matters involving judicial administration, procedures should be free from even the appearance of unfairness." **In re Court Budget and Court Personnel Essex County, 81 N.J. 494, 497 (1980).**

To the extent the inconvenience of the preferred practice unduly encourages some trial judges to hear the matter themselves, the power of the appellate court to make an independent review of the facts and law provides an adequate safeguard for the allegedly contumacious attorney.

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See Dias, supra, 76 N.J. Super. at 339; In re Clawans, supra, 69 N.J. Super. at 378.

The competing interests create a spectrum for selecting the appropriate procedure. The determination of the procedure depends on where the explanation falls on the spectrum. Where the explanation is clearly inadequate, the need to maintain the authority of the court should predominate. The offense should be treated as a direct contempt. Where there is a good faith excuse, although another judge may find it to be inadequate, the predominant consideration should be enhancement of procedural due process for the alleged contemner. The offense should be treated as an indirect contempt. The explanation and the factual background color the characterization of the offense and affect the determination of the appropriate procedure as well as the ultimate outcome.

Whether the hearing proceeds before the

same or another judge, there must be proof of criminal intent to establish contempt as a public offense. As former Chief Justice Weintraub wrote, "[T]he act or omission must be accompanied by a mens rea, a wilfullness, an indifference to the court's command." N.J. Dept. of Health v. Roselle, supra, 34 N.J. at 337; see In re: William Brown, Jr., 50 N.J. 435, 437 (1967); In re Carton, supra, 48 N.J. at 25. Consequently, the offended judge must prove wilfullness by the alleged contemner, who may present rebuttal evidence.

In this case, the explanation was frivolous. Respondent went to Bermuda in the middle of winter. Whether he went for a vacation, as his daughter stated, or for business, as he asserted, the explanation was clearly inadequate. His unexcused absence was particularly egregious when viewed against the background of a multiple defendant criminal gambling conspiracy case and

the admonitions of trial judge.

There is no evidence of intemperate conduct on the part of the trial judge. Rather, Judge Loftus complied strictly with the requirements of **R. 1:10-1 et seq.** and the procedures outlined in this opinion.

Accordingly the judgment of the Appellate Division is reversed, and the judgment of conviction by the trial court and the $500 fine are reinstated.

Chief Justice Wilentz and Justices Sullivan and Clifford join in this opinion.

Justice Handler filed a separate concurring opinion in which Justices Pashman and Schrieber join.

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SUPREME COURT OF NEW JERSEY
A-78 September Term 1979

IN THE MATTER OF

JOHN W. YENGO, ESQ.,

Charged with Contempt.

HANDLER, J., concurring.

I concur in the result reached by the Court in this case. A defense attorney whose unauthorized and unannounced absence from court in the middle of a complicated, multiple-defendant criminal trial is appropriately disciplined under the summary contempt authority of the trial court. R.1:10-1. I write separately to emphasize the point that the contemptuous conduct which occurred here was a direct affront to judicial authority and was most properly punished as a summary contempt.

The offensive conduct occurred during the

course of a criminal trial involving ten defendants who were charged with numerous conspiracy and gambling offenses. The trial also involved wiretap evidence. This admixture created especially complex and unusual trial problems. For example, the number of defendants created an obvious potential for conflicts of interest among defense counsel and raised special concerns on the part of the trial judge as to attorney conduct. Cf. State v. Bellucci, 81 N.J. 531, 544 (1980) (representation of multiple defendants by defense counsel raises ethical conflicts which impact upon an individual defendant's constitutional right to effective assistance of counsel).

Judge Loftus, who presided over the criminal trial, stressed to defense counsel the importance of their commitment to the trial and admonished them as to the urgency of their attendance and punctuality. John W. Yengo, who represented one of the defendants, was fully

aware of the judge's instructions to counsel. Nevertheless, on March 2, 1978, he failed to appear at trial without having previously informed the trial judge of his expected absence.

After Yengo's unannounced, unexplained, and unexcused absence from trial, Judge Loftus made it clear when Yengo subsequently appeared before her that her main grievance concerned Yengo's failure to notify the court of his expected absence. Yengo, however, explained that he had been absent in order to go to Bermuda "[o]n a business venture" for some clients and that until "late Wednesday night [March 1], [he] hadn't made up [his] mind whether [he] would go [to Bermuda] or come [to the trial on Thursday]." Yengo, who obviously had anticipated being absent, had obtained a substitute attorney, and had advised other defense counsel and his client of his expected absence, was unable to explain his failure either to seek permission of the court for

his absence or even to notify the court of his impending or anticipated absence. After giving Yengo a full opportunity to explain this absence and his failure to notify the court, the trial judge then cited him for contempt, a citation which, following the later imposition of a $500 fine, was certified by the trial judge. R.1:10-1.

As I view it, this case involves the inherent contempt power of the judiciary to challenge and to punish affronts to its authority. It has long been recognized that there are occasions when this inherent authority must be exercised both swiftly and summarily in order to ensure obedience to court orders and respect for court procedures. See In re Oliver, 333 U.S. 257, 274 S.Ct. 499, 508, 92 L.Ed. 682, 695 (1948); Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767, 773 (1925); Ex parte Terry, 128 U.S. 289, 302-302, 9 S.Ct. 77, 79, 32 L.Ed. 405, 408 (1888). The summary contempt power is

integrally related to judicial self-preservation. State v. Zarafu, 35 N.J. Super. 177, 182 (App. Div. 1955). "The sole credible basis for the summary contempt process is necessity, a need that the assigned role of the judiciary not be frustrated." In re Fair Lawn Education Ass'n., 63 N.J. 112, 114-115 (1973), cert. den. 414 U.S. 855, 94 S.Ct. 155, 38 L.Ed. 2d 104 (1973); McAllister v. McAllister, 95 N.J. Super. 426, 440 (App. Div. 1967). This judicial "power is as ancient as the courts to which it is attached and 'as ancient as any other part of the common law.'" In re Caruba, 139 N.J. Eq. 404, 427 (Ch. 1947), aff'd 140 N.J. Eq. 563 (E. & A. 1947), cert. den. 335 U.S. 846, 69 S.Ct. 69, 93 L.Ed. 396 (1948) (quoting Rex v. Almon, 97 Eng. Rep. 94, 99 (K.B. 1765)).[1]

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[1] Our rules of court, as well as our statutory law, codify this inherent judicial power. R.1:10-1 provides that "[c]ontempt in the actual presence (Cont'd)

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The summary contempt power operates upon contemptuous conduct occurring "in the actual presence of a judge." R.1:10-1. New Jersey courts have treated the question of what constitutes a contempt in the "actual presence of the court" primarily in terms of the capacity of such conduct to undermine the court's authority and to interfere with or obstruct the orderly administration of justice. In re Caruba, supra, 139 N.J. Eq. at 411. Ordinarily, contempts of this nature occur directly to and before the judge; hence, the terms "direct contempt" and "contempts in facie

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1 (Cont'd)

of a judge may be adjudged summarily by the judge without notice or order to show cause." N.J.S.A. 2A:10-1 recognizes that the power of the court to punish for contempt extends to the "[m]isbehavior of any person in the actual presence of the court" as well as "[d]isobedience... to any lawful...command of the courts" and confirms the "inherent jurisdiction of the...court to punish for contempt. "Currently, the New Jersey Code of Criminal Justice preserves the judicial "power to punish for contempt..." N.J.S.A. 2C:1-5(c).

curiae" are generally used interchangeably. Id. at 423. Our courts, however, have never imposed as a prerequisite for a "direct contempt" that every facet of the contemptuous conduct or each element of proof of the contempt be based upon evidential matters occurring only in the actual presence of the judge. To that extent, I disagree with the contrary suggestion of the court. Ante at ___ (slip op. at 16). The court in Caruba, for example, rejected the argument that false swearing before a master rather than before a judge was not a contempt in facie curiae. 139 N.J. Eq. at 425. The court stated:

> "In defining what is meant by 'the presence of the Court,' as that term is used with reference to contempts, it is said that 'the Court' consists not of the judge, the courtroom, the jury, or the jury room individually, but all of these combined. The Court is present whenever any of its constituent parts is engaged in the prosecution of the business of the court according to law." [Id. at 421-422 (citation omitted).]

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Similarly, in State v. Sax, 139 N.J. Super. 157 (App. Div. 1976), certif. den. 70 N.J. 525 (1976), the court recognized that an act of contempt need not occur in the actual presence of the court or judge so long as it constitutes a direct and immediate affront to judicial authority. In Sax, the Appellate Division upheld a contempt conviction of an individual who after having received a parking ticket, had sent to the municipal court clerk a letter which contained vulgar language and which charged the court with using "ugly" and coercive methods to get money from the individual. Id. at 159. Even though the judge did not initially receive the letter, the judge certified the contents thereof, heard arguments from the letter writer and his attorney, and adjudged the former guilty of contempt in facie curiae. Ibid. The court held that such a letter is an act of contempt in facie curiae even though the judge may never see or hear it at all. Id.

at 160. See State v. Gussman, 34 N.J. Super. 408, 417 (App. Div. 1955).

When the conduct or behavior involves an attorney's courtroom absence, tardiness, or other form of recalcitrance, that conduct may also be treated as a direct contempt in the court's presence if it directly and with some immediacy interferes with the judge's actual exercise of judicial power, offends the authority of the court, and obstructs orderly judicial administration. For example, In re Clawans, 69 N.J. Super. 373 (App. Div. 1961), certif. den. 36 N.J. 296 (1962), cert. den. 370 U.S. 905, 82 S.Ct. 1250, 8 L.Ed. 2d 401 (1962), dealt with an attorney who was convicted summarily of two contempts which involved separate occasions of both tardiness in appearing before the court and a refusal to give adequate reasons for non-appearances, contrary to the court's specific and repeated instructions. The Appellate Division held that both acts of contempt

constituted conduct which obstructed or tended to obstruct the course of justice; further, the court specifically held that "Clawans failure to appear...constituted contempt in the face of the court." Id. at 381. To the same effect is State v. Dias, 76 N.J. Super. 337, 340 (App. Div. 1962) wherein defendant was punished summarily for contempt upon arriving late for court without a justifiable excuse.

The court in this case seems too preoccupied by the apparent conundrum that a courtroom "absence" is an ambiguous act and, thus, even though the absence itself necessarily occurs or becomes evident "before the court," its character as a contempt assertedly cannot be ascertained without an "explanation." Embedded in this expression of puzzlement is the unexpressed assumption that no direct contempts under R.1:10-1 can ever require affirmative proofs other than those which occur directly in the actual presence of the

judge. The Court on this point seems to think that unless the contempt in all aspects can be established solely by the judge qua eyewitness, it should not be regarded as a "direct contempt" to be dealt with summarily.

If this is the Court's position, it is unrealistic and not in accordance with our case law. In one of our leading cases dealing with the summary contempt power, In re Carton, 48 N.J. 9, 21 (1966), it was recognized implicitly that a contempt in the court's presence may in some instances involve conduct which has not occurred fully before the court or which requires some incidental, extraneous proofs. If, however, the significant or essential offensive conduct has occurred both before the court and in a manner which directly impacts upon the court's authority and control of the judicial process, then that conduct can be considered and treated as a summary contempt. With respect to any aspects of the

offensive conduct which may not have actually taken place in the trial court's actual presence or which may be otherwise unknown to the judge, the Court in **Carton** stated that:

> [t]he defendant's right to be heard is limited to the proof of material facts, if any, of which the court may be unaware, to the legal evaluation of the facts, and to punishment. [Ibid. (emphasis added).]

With few exceptions, every contempt calls for an "explanation." Thus, in **In re Logan, 52 N.J. 475, 477 (1968)**, it was recognized that, even in a summary contempt proceeding against an attorney, the attorney should be informed of the charge and given an opportunity either to dispel any possible "misunderstanding" or to present any exculpatory facts which are unknown to the court.

Every contempt, including those which palpably and frontally assault the senses of the court, demands proof that it was committed by the offender with "criminal intent." See **In re Brown,**

50 N.J. 435, 437 (1967); see also In re Carton, supra, 48 N.J. at 25. As stated in New Jersey Dep't of Health v. Roselle, 34 N.J. 331, 337 (1961), "[t]he act or omission must be accompanied by a mens rea, a willfulness, an indifference to the court's command." No judge, even one who is personally, directly, and unmistakably victimized by a contemnor, is presumed in the context of a criminal proceeding to have the perspicuity to read minds; thus, the judge cannot dispense with proofs of mens rea and deny the contemnor the opportunity to present rebuttal evidence concerning intent. It is for this fundamental reason that all persons charged with contempt before the court, no matter how seemingly obvious their guilt, must be accorded the right to present evidence bearing upon the quality of their conduct, including their state of mind. In re Carton, supra, 48 N.J. at 21. The "explanation" of an unauthorized courtroom absence, which the Court

quite properly characterizes as indispensable to establish the contumacious character of the absence (**ante at ___ (slip op. at 13)**), is simply to be understood in terms of the issue of mens rea. Hence, the usual requirement of proof of intent and the opportunity for the charged party to rebut any normal inferences of a guilty state of mind by offering an "explanation" does not convert an obstructive courtroom absence, which itself has occurred in court and which directly interferes with the court's authority, into some other kind of non-event or innocuous occurrence that mysteriously has taken place somewhere else.

Although this Court talks of a majority position that would regard a courtroom absence as an indirect contempt (**ante at ____ (slip op. at 14)**), that view has no dominant following. There are several courts which have concluded that this species of contempt, an unexplained and unexcused absence from court contrary to explicit

judicial command, is appropriate for summary disposition. Ante at ____ (slip op. at 15-16). As already indicated, our own courts have long adhered to this view. Ante at ___ (concurring slip op. at 7). Thus, I would not temper or dilute the inherent judicial authority to deal promptly and vigorously with this kind of contemptuous behavior.

The court expresses genuine concerns prompting it to fashion a rule that would encourage a limitation on the availability of the summary contempt power in situations involving courtroom absences. I do not think a call for judicial timidity is warranted by what has occurred in this case. To be sure, the summary contempt powers should be used sparingly. See ante at _____ (slip op. at 10-11). In an appropriate case such as this, however, when the summary contempt power is needed to vindicate the authority of the court and to rectify an obstruc-

tion of its orderly procedures, it would disserve the cause of justice not to invoke that power. With respect to the potential for abuse of the summary contempt power, there are unusually strong safeguards against its arbitrary exercise. In every case, there is the constant responsibility of a judge to disqualify himself or herself for hostility or bias. See **Van Sweringen v. Van Sweringen, 22 N.J. 440, 447-448 (1956).** Furthermore, a judge who is confronted with a direct contempt, though not subject to disqualification, nonetheless retains the discretion to deal with that contempt under the more formal procedures of **R.1:10-2 and R.1:10-4. Swanson v. Swanson, 8 N.J. 169, 184 (1951).** Most important is the extraordinary scope of judicial review in contempt hearings, constituting a judicial failsafe against not only trial court abuse, but trial court mistakes as well. Our appellate courts -- both intermediate and highest -- are authorized to make

independent determinations of the facts as well as the law. State v. Dias, supra, 76 N.J. Super. at 339; In re Clawans, supra, 69 N.J. Super. at 378; R.2:10-4.

Within the framework of this appeal, the due process concerns voiced by the Court, ante at ___ (slip op. at 11), are overstated. The self-evident nature of the contemptuous conduct obviates formal notice and eliminates unfair surprise; the opportunity to be heard and to present proofs and argument, an opportunity available even in summary contempt proceedings, In re Carton, supra, 48 N.J. at 21, satisfies due process and fairness requirements. See, e.g., In re Oliver, supra, 33 U.S. at 274-275, 68 S.Ct. at 508-509, 92 L.Ed. at 694-695; In re Clawans, supra, 68 N.J. Super. at 381. Here, for example, no one could credibly contend that Yengo was not fully aware that he had disobeyed the court's directives and, further, that when summoned to

account, he was caught by surprise and denied a full opportunity to exculpate himself.

In the context of this adjudication, the appellate court should neither denigrate the seriousness of Yengo's contumely nor minimize the obstruction that he created in orderly judicial administration. A trial need not grind to a halt before obstreperous conduct can be regarded as a contemptuous affront to judicial authority. The combination of a purposeful attempt to interfere with the court and intentional acts which have the tendency to obstruct a court is sufficient. In re Caruba, supra, 139 N.J. Eq. at 411. This unquestionably occurred in this case.

I would not, as the majority seems to do, only haltingly affirm the contempt judgment of the trial court. Judge Loftus, in my estimation, showed commendable skill in the management of a difficult trial and exhibited firmness and fairness in dealing with defense counsel in the

course of this trial. The adjudication of Yengo's contempt was in strict conformity with our rules governing summary contempts and was handled by Judge Loftus with poise, patience, and objectivity.

It is entirely appropriate that the Court in this appeal exercise its de novo jurisdiction and make an independent finding of guilt. R.2:10-4. An examination of the record should bring the Court unqualifiedly to the same perceptions of the Appellate Division, which stated, "We concur completely with the trial judge's assessment of Yengo's conduct and have no doubt that it was undisputably and egregiously contumacious."

For these reasons, I concur in the result reached by this Court and would reinstate the trial court's judgment of contempt.

Justices Pashman and Schreiber join in this concurring opinion.

APPENDIX B

IN THE MATTER OF JOHN W. YENGO
CHARGED WITH CONTEMPT.

Superior Court of New Jersey
Appellate Division

Argued on January 29, 1979-
Decided March 23, 1979.

SYNOPSIS

An attorney was held in contempt in facie curiae by the Superior Court, Law Division, and, on appeal, the Superior Court, Appellate Division, held that failure of an attorney for a defendant in a criminal case to appear in court at a time during trial did not constitute contempt unless absence was willful, i.e., without just excuse, and thus no contempt was committed in facie curiae.

Reversed and remanded.

1. Contempt - 3

Contempt is criminal offense. R.1:10-1; R.1:10-2 to R.1:10-4.

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2. Contempt - 20

Before absence of person from court can be adjudged to be contumacious there must be finding of fact as to reason therefor. R.1:10-2; R.1:10-4.

3. Contempt - 52

Power of court to deal immediately and summarily with direct contempt is based upon factor that conduct itself is affront or impediment to proper administration of proceeding, which must be dealt with forthwith to support judge's control of the courtroom and upon factor that conduct is known to judge by his own senses and therefore he need not adduce proof of the wrong but merely certify facts he witnessed in order of conviction. R.1:10-1; R.1:10-2 to R.1:10-4.

4. Contempt - 20

Failure of attorney for defendant in criminal case to appear in court at time during trial did not constitute contempt unless absence was will-

ful, i.e., without just excuse, and thus no contempt was committed in facie curiae. R.1:10-1; R.1:10-2 to R.1:10-4.

Before Judges Conford, Pressler and King

Mr. Raymond R. Wiss argued the cause for appellant John W. Yengo, Esq. (Mr. Seymour Margulies, attorney).

Ms. Erminie L. Conley, Assistant Attorney General argued the cause for respondent State of New Jersey (Mr. John J. Degnan, Attorney General of New Jersey, attorney).

The opinion of the court was delivered by PRESSLER, J.A.D. Appellant John Yengo, a member of the bar of this State, appeals from an order entered pursuant to R.1:10-1 adjudging him in contempt in facie curiae and fining him $500. The conduct constituting the gravamen of the offense was his unexcused absence from court for a two day period during a protracted criminal trial of

multiple defendants, one of whom, Leo Leone, he represented.

The primary contention Yengo makes on this appeal is that the alleged offense, if an offense at all, was not a contempt "in the actual presence of the judge" subject to the summary disposition power of the judge contemned but rather constituted a contempt requiring prosecution and hearing by another judge pursuant to **R.1:10-2 and R.1:10-4.**

The relevant facts are essentially undisputed. An Essex County indictment, encaptioned **State v. Errico, et al.,** charged ten defendants with participation in an illegal gaming operation and the conspiracies by which it was conceived and conducted. Trial was expected to be both lengthy and difficult, both because of the number of defendants and consequently the number of lawyers whose daily participation would be required and because of the complexity of the

proofs, particularly those arising out of an extensive electronic surveillance. Accordingly, when the trial actually commenced on February 14, 1978 the judge advised all counsel that in order to complete the matter as expeditiously and fairly as possible their prompt and continuous attendance at trial was imperative. Counsel were clearly instructed to avoid any involvement in or commitment to any other matter during the duration of the Errico trial and to advise all other courts before whom any might have business of that engagement. The import of these instructions was again repeated from time to time as the trial progressed. There can be no question of Yengo's awareness of them, particularly in view of his request of the trial judge that he advise another trial judge before whom Yengo was scheduled to appear of this trial commitment.

The trial continued without interruption or incident until Thursday morning, March 2, 1978.

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Because of the making of various motions not involving Yengo's client, the actual trial before the jury did not resume until mid-morning. At that time Yengo's absence was noted. The trial judge inquired of Yengo's client, Leone, as to his knowledge of Yengo's whereabouts. Leone then stated that he was aware that Yengo was not intending to be in court but that he had arranged for another lawyer to be present in his stead. Several of the other defense counsel confirmed their understanding that Yengo himself would be absent. Shortly thereafter a young attorney, a Mr. Burns, arrived in the courtroom and advised the court that he was "covering" for Yengo. Leone agreed to the representation on the record, and trial resumed with the cross-examination of the State's witness who had monitored the wiretap and who, apparently, was the critical witness as to Leone's involvement in the conspiracy. Burns chose not to cross-examine him.

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The trial judge was concerned that Burns' untoward decision not to cross-examine the monitor might seriously jeopardize Leone's interests. Having assumed that Yengo's absence was to be of brief duration, the judge then interrogated Burns as to Yengo's whereabouts with the intention of requiring his immediate appearance. It was at that point that the trial judge was first made aware of the fact that Yengo had left the country the night before, was not due back until the following Monday and, despite, Burns' general inexperience and his basic unfamiliarity with the case, had asked him to appear for him both that day and the next. The judge's concern for the integrity of Leone's trial was further compounded by the fact that on the following day a State's expert was scheduled to testify as to opinions based on facts adduced during the eight proceeding trial days. The judge himself then undertook an investigation of Yengo's where-

abouts, culminating in a telephone conversation with Yengo's daughter who advised that Yengo had gone on a four-day vacation to Bermuda and would return on Sunday evening, and that she did not know where in Bermuda he could be reached. The judge then directed that the expert's testimony would have to await Yengo's return. On Monday, March 6, 1978, Yengo appeared in the courtroom and told the judge that he had had to attend to a business matter in Bermuda and had not felt, in view of his arrangement with Burns, that it was necessary to advise the court of his projected absence. The contempt citation was followed, the judge concluded that:

> The action of John Yengo, Esq., in going to Bermuda for two court days in the third week of a five-week, complex wiretap gambling conspiracy case with ten defendants and a seventeen-member jury without prior notice and approval of the court and without leaving word as to where he could be reached, constituted a disruption in the Court proceedings, disobedience

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> of the court order prohibiting involvement in other proceedings, a lack of respect for the Court, a lack of professional responsibility, as well as conduct prejudicial to the administration of justice.

[1] We concur completely with the trial judge's assessment of Yengo's conduct and we have no doubt that it was indisputably and egregiously contumacious. We nevertheless are constrained to reverse the contempt citation because we are of the view, for the reasons hereinafter expressed, that an attorney's absence does not constitute a contempt in facie curiae and hence that an alleged contempt based on that charge must be prosecuted pursuant to R.1:10-2 and R.1:10-4. We are also constrained to recognize that contempt is a criminal offense. The fact that certain categories of contempt are susceptible to summary disposition does not mean that those categories are also susceptible to directed verdicts of guilt. We would be tempted, as an alter-

native to reversal, to exercise our de novo jurisdiction and to make an independent finding of guilt were we not, in our view, constitutionally restrained from so doing.

[2] We recognize that the law is well settled both in this jurisdiction and uniformly throughout this country that an attorney's absence from a courtroom in which he has a duty to appear before a judge to participate in a scheduled proceeding in which he is counsel for a party constitutes a contempt of that court if his absence is without valid or reasonable excuse grounded in inability or incapacity. See In re Clawans, 69 N.J. Super. 373 (App. Div. 1961), certif. den. 36 N.J. 296 (1962), cert. den. 370 U.S. 905, 82 S.Ct. 1250, 8 L.Ed. 2d 401 (1962). And see Annotation "Attorney - Court Attendance -- Contempt," 97 A.L.R. 2d 431 (1964), and supplementary service thereto. The point is that it is not merely the absence which constitutes the

contempt. It is rather a willful absence, that is, an absence without just excuse, which constitutes the offense. Thus, it is clear that before the absence can be adjudged to be contumacious there must be a finding of fact as to the reason therefor. The necessity, however, for a prerequisite finding to be made as to circumstances not themselves occurring in the courtroom results, by definition, in the contempt, if there is one, not having been committed in facie curiae.

[3,4] The reason for the foregoing conclusion is evident. As the New Jersey Supreme Court made clear in In re Contempt of Carton, 48 N.J. 9, 21 (1966), the power of the court to deal with a direct contempt immediately and summarily is based upon the concurrence of two distinct considerations. The first is that the conduct itself is an affront or an impediment to the proper administration of the proceeding, which must be dealt with forthwith "to support the judge's con-

trol of the courtroom." The second is that the conduct is known to the judge "by his own senses" and, therefore, "he need not adduce the proof of the wrong, by may merely certify the facts he witnessed in the order of conviction." The first of these may or may not obtain when an attorney is absent. The second, however, cannot obtain until there has been proof adduced as to the reason for the absence. Thus, it cannot be said that all of the elements of the offense are perceivable by the judge by his own senses. The offense, therefore, cannot be a direct contempt within the contemplation of R.1:10-1, but rather constitutes an indirect contempt, subject to the procedural prescriptions of R.1:10-2 to 4, inclusive.

We reject the minority view which holds that an absence without valid excuse may be deemed to be a direct contempt. See, e.g., Chula v. Superior Court, 57 Cal. 2d 199, 18 Cal. Rptr.

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507, 368 P.2d 107 (Sup. Ct. 1962) (Traynor, J., Peter and Dooling, J.J., dissenting). We are persuaded by the logic of Justice Traynor's disent in Chula and his observation that:

> In stating that "The failure of an attorney, without valid excuse, to be present***constitutes***a direct contempt", the majority opinion itself implicityly concedes that petitioner's contempt, if any, cannot be subject to summary punishment. The absence of a valid excuse is an indispensable element of the contempt. The trial judge could not discover the nature of the excuse or determine its validity without a hearing. [18 Cal. Rptr. at 513, 368 P.2d at 113]

We do not regard In re Clawans, supra, relied on by the State, as contrary to our holding here. While it is true that we there affirmed a conviction of a direct contempt where an attorney failed to appear in court as scheduled, the substance of the contempt there was not merely the absence but also the attorney's refusal to offer an explanation for her absence when she finally did

arrive, her continued refusal to proceed with the scheduled matter, and her refusal to give a reason for that refusal.

We are also persuaded that considerations of public policy mandate the result here. The bench and the bar perform very different functions in our justice system, and the differences in their respective obligations, perspectives and orientations produce inevitable tension between them. We accept and accommodate to that tension in its ordinary occurrence as a fundamental predicate of the adversary system. But we do so with the recognition that a free and independent bar, because it is at the very core of that system, must be protected from the arbitrary use of power by the bench. We do not at all intend to suggest that the exercise of judicial power here was arbitrary. Our concern rather is directed towards a precedential use of judicial power in circumstances both amenable to and calling for

vindication on notice, prosecution and hearing before a different judge. In view of our reversal we need not consider Yengo's remaining challenges to the contempt conviction.

The contempt conviction is reversed. We remand to the trial court for such further proceedings as it may deem it appropriate to institute.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY - LAW DIVISION

IN THE MATTER OF	:	
JOHN W. YENGO, ESQ.,	:	CERTIFICATION
CHARGED WITH CONTEMPT,	:	
DEFENDANT.	:	

PURSUANT TO R. 1:10-1, I hereby certify that:

1. I am a Judge of the Essex County Court of the State of New Jersey, temporarily assigned to the Superior Court, Law Division of the State of New Jersey.

2. In the performance of my judicial responsibilities the consolidated cases of **State v. Errico, et al, Ind. No. 2175-74 and Ind. No. 3491-75,** were assigned to this Court for trial. One of the ten defendants was Leo Leone, who was represented by John W. Yengo, Esq.

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3. By order of this Court, said cases were peremptorily scheduled for trial on Tuesday, February 6, 1978. Because of the severe weather conditions the courts were closed on February 6 and 7, 1978.

4. On February 8, 1978, I directed all attorneys to clear their calendars of all other matters and not to get involved in any other matter, including any other court proceeding without prior approval of this Court. This order was issued because of the complexity of this wiretap gambling conspiracy case, the number of defendants (ten), the anticipated length of trial (five weeks), as well as the number of jurors who would have to be selected because of the weather and health conditions existent at that time (eighteen).

5. John W. Yengo, Esq. was present on several occasions when I reiterated that order, including February 15, 1978. He acknowledged

his awareness of that order on February 15th by requesting me to advise another Judge before whom he had a case scheduled of the fact that he was on trial before me.

6. After resolving certain problems that were occasioned by the illness and non-appearance of one of the defendants, Anne Errico, during February 14, 15 and 16, 1978, an eighteen-member jury was selected on Friday, February 17, 1978.

7. Testimony started on Tuesday, February 21st and continued through that week as well as the week of February 27th. On all of these dates John W. Yengo, Esq. was present representing Mr. Leone.

8. On Thursday, March 2, 1978, the ninth day of trial, important motions concerning the testimony of a potential State witness were heard from 9 A.M. to 10:30 A.M. The jury had been instructed to come in at 10:30 A.M. The Court

noted that Mr. Yengo was not present during these motions. However, it was not concerned with such fact because the Court realized that the motions were directed to a witness who would testify concerning matters not related to Mr. Yengo's client. At approximately 10:50 A.M. when the Court was ready to go out on the bench to resume the trial, I was advised by my court attendant that Mr. Yengo was not present in the courtroom. Mr. Yengo had not spoken to me and had not requested to be excused for any reason. My secretary checked with his answering service and was advised that he was in Court.

9. At 10:50 A.M. I went on the bench. Mr. Yengo was not present in the courtroom. When I inquired of Mr. Leone as to the whereabouts of Mr. Yengo, he indicated that Mr. Yengo wouldn't be there and that he would have someone take his place. However, Mr. Leone did not know who the attorney would be. A few attorneys

further indicated that they were aware that Mr. Yengo did not intend to be present. No attorney was present at that time to cover for Mr. Yengo. At 10:55 A.M. Lawrence Burns, Esq. entered the courtroom and indicated that he was going to appear for Mr. Yengo. After obtaining Mr. Leone's consent to have Mr. Burns appear for Mr. Yengo -- which I assumed to be of short duration -- the trial continued with the cross-examination of the State's witness who had monitored calls pursuant to a Court-authorized wiretap, including calls containing references to "Leo" to "Leone's Restaurant," which evidence indicated was owned by the defendant, Leo Leone.

10. Between 11 o'clock and 12:15 P.M. when the Court recessed for lunch, Mr. Burns sat stoically at counsel table and when asked whether he wished to cross-examine the monitor, replied negatively.

11. When the Court recessed for lunch, I

requested Mr. Burns to come to sidebar in order that I could ascertain where Mr. Yengo was and direct him to return to Court immediately. At that time Mr. Burns informed me that Mr. Yengo was out of the Country and that he did not know where. This was the first time that I was apprised of this fact. Surprised, astonished and disturbed because of the potential problems that such fact created for the Court as well as the integrity of the trial, I then called Mr. Burns into my chambers.

12. In chambers Mr. Burns advised me that Mr. Yengo had contacted him for the first time with regard to his representation at 9 P.M. the evening before. Mr. Burns had gone to Mr. Yengo's house at 11 P.M. and remained there for fifteen minutes during which time Mr. Yengo gave him the file as well as a brief synopsis of the case and requested him to appear Thursday and Friday, March 2nd and 3rd for him. The record

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will speak for itself as to my deep judicial concern with Mr. Burns being catapaulted into a case of this nature at this point where the monitor was still on the stand and where according to the anticipated schedule, the State's expert would testify on Friday, March 3rd. I was deeply concerned with Mr. Burns' ability to properly represent Mr. Leone when it became clear to me that his only contact with the case had been several weeks before during plea negotiations and a fifteen-minute conversation at 11 o'clock the night before. I directed Mr. Burns to review the file during lunch, confer with Mr. Leone and confer with the other attorneys. I then embarked upon a course of action to ascertain Mr. Yengo's specific location in order that I could by any means of communication direct him to return immediately to the courtroom. My attempts were futile. My secretary continued to call his answering service who advised her that they did not

know where Mr. Yengo was and that he had not contacted them. I contacted his daughter, Susie, at home who advised me that her father had gone to Bermuda on a four-day vacation and was expected to return Sunday, March 5th. She could not even inform me as to the specific hotel where he was staying in order that I could cablegram him to return immediately.

13. After lunch I had all attorneys in chambers and inquired as to whether or not Mr. Yengo had informed any of them as to where he was planning to go. They could not be of assistance to the Court. I conferred with the attorneys and spoke with Mr. Burns. After such conference, I concluded that Mr. Burns could continue to represent Mr. Leone up to the point of the expert's testimony which at that time was scheduled for Friday, March 3rd. My decision was based upon the fact that Mr. Yengo had been present for the prior eight days of factual testi-

mony and evidence upon which the expert's opinion would be based. I made a decision that if the expert were to take the stand on Friday, March 3rd as anticipated, I would have no choice, considered the rights of all parties, but to continue the trial until Monday when Mr. Yengo would return. At that point there were ten defendants, one of whom was a pro se defendant, eight attorneys, seventeen jurors and the entire staff standing ready to proceed.

14. The testimony of the monitor concluded and, in fact, testimony of the State's witness, Dolores Sbano, continued through Friday, March 3rd.

15. I continued to attempt to locate Mr. Yengo's specific whereabouts but was unable to do so. I then directed that a telegram be sent to his home ordering him to appear before me on Monday morning, March 6th at 9 A.M.

16. Mr. Yengo appeared on March 6, 1978

APPENDIX C

at 9 A.M. He advised me that he had gone on a business venture to Bermuda and that he did not feel it was necessary to advise the Court of his whereabouts.

17. The action of John Yengo, Esq., in going to Bermuda for two court days in the third week of a five-week, complex wiretap gambling conspiracy case with ten defendants and a seventeen-member jury without prior notice and approval of the Court and without leaving word as to where he could be reached, constituted a disruption in the Court procedings, disobedience of the Court order prohibiting involvement in other proceedings, a lack of respect for the Court, a lack of professional responsibility, as well as conduct prejudicial to the administration of justice.

18. Mr. Yengo was adjudged guilty of contempt in the presence of the Court, pursuant to R. 1:10-1, on March 6, 1978. Such judgment

APPENDIX C

was reaffirmed April 14, 1978. On April 14, 1978 a fine of $500, payable within one week to the Essex County Clerk was imposed. An extension of time to pay the fine within one week from the date of the written order was granted.

19. All the foregoing facts are supported by the record.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

s/M.L.
MARILYN LOFTUS, J.C.C.
J.S.C.

Dated: April 21, 1978

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY - LAW DIVISION

IN THE MATTER OF	:	ORDER OF JUDGMENT
JOHN W. YENGO, ESQ.,	:	IN CONVICTION OF
CHARGED WITH CONTEMPT,	:	CONTEMPT IN
DEFENDANT.	:	FACIE CURIAE

This matter having been opened on the Court's own motion on March 6, 1978 pursuant to **R. 1:10-1** as to why John W. Yengo, Esq. should not be adjudged guilty of contempt in the actual presence of the Court, and the Court having heard John W. Yengo, Esq., and

The Court having concluded that the actions of John W. Yengo, Esq. in going to Bermuda for two court days in the third week of a five-week, ten-defendant wiretap gambling conspiracy case, **State v. Errico, et al**, Indictments No. 2175-74 and 3491-75, with a seventeen-member jury,

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without prior notice and approval of the Court and without leaving word as to where he could be reached, constituted a disruption of the Court proceedings, a lack of respect for the Court, a disobedience of the Court order prohibiting involvement in other proceedings, a lack of professional responsibility and conduct which was prejudicial to the administration of justice, and

For the reasons set forth in the attached certification as well as the reasons set forth on the record,

I hereby find that the aforesaid conduct of John W. Yengo, Esq. constitutes contempt in the actual presence of the Court, and

IT IS THEREFORE on this 21st day of April 1978 adjudged that John W. Yengo, Esq. is guilty of contempt in the actual presence of the Court, and

IT IS THEREBY ordered that a fine of $500 be imposed, said fine to be payable to the Essex

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County Courts Building, Newark, New Jersey within one week from the date of this order.

s/M.L.
MARILYN LOFTUS, J.C.C.
t/a J.S.C.

I certify this to be
a True Copy.

80-726

No.

Supreme Court, U.S.
FILED
DEC 22 1980
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

IN THE MATTER OF

JOHN W. YENGO, ESQ. Charged with Contempt,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of United States

BRIEF IN OPPOSITION

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Rules Cited

FRCrP:

42(a) 6, 7

Rule 1:10-1 ..... 4, 7, 11

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

IN THE MATTER OF

JOHN W. YENGO, ESQ. Charged with Contempt,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of United States

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BRIEF IN OPPOSITION

Counter-Statement of Issues Involved

Did the exercise of the summary contempt power by the State trial court violate the Fourteenth, Fifth and Sixth Amendments of the United States Constitution when in the middle of a complex criminal conspiracy/wiretap trial petitioner absented himself for a four-day weekend trip to Bermuda in direct intervention of the court's orders where the absence had an immediate disruption upon the trial proceedings, where at the time of the absence the location of counsel was made known to the trial court,

where petitioner was offered on two occasions an opportunity after notice to explain or defend his actions and where petitioner never objected to the proceedings?

Counter-Statement of the Case

This case involves application of the summary contempt authority of a New Jersey trial court where a defense attorney absented himself during the middle of a complex criminal trial for a weekend trip to Bermuda without authorization and in direct contravention of court orders. Petitioner, at the time of the contempt proceeding involved herein, represented one of ten defendants in a complex wiretap, gambling and conspiracy case. It was anticipated that the trial would last for five weeks and that the selection of 18 jurors would be required (Aa47 to Aa40).* Accordingly, the trial was peremptorily scheduled for February 6, 1978. Because of weather conditions, however, courts were closed February 6 and 7. In an effort to assure prompt and efficient movement of the trial, the trial court on February 8 directed all attorneys involved in the case to clear their calendars of all other matters and not to become involved with any other matter without prior approval of the court (Aa48, 1T8-22 to 1T9-6,** 3T3-8 to 11).

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* As used herein, Aa— refers to the appendix filed by petitioner Yengo with the Appellate Division of the Superior Court of New Jersey which appendix was also filed with the Supreme Court of New Jersey.

** The various portions of the transcripts which are cited herein are located in the appendices filed by both petitioner Yengo and respondent State of New Jersey with the Appellate Division of the Superior Court of New Jersey and which were also filed with the Supreme Court of New Jersey.

Petitioner Yengo was fully aware of this requirement (Aa48, 3T3-8 to 10). On February 14, 1978 all attorneys were once again instructed that when the trial began they must appear punctually every day of the trial and were fully warned by the trial court that failure to abide by her directives would result in the imposition of sanctions (2T2-15 to 2T3-22) (Pet. App. 3a to 6a).

By February 17, 1978, an 18 member jury was chosen and the trial commenced and continued during the weeks of February 20 and 27. On the ninth day of the trial, March 2, 1978, petitioner did not appear to represent his client. He had not previously advised the court of his intended absence (Aa49). Although petitioner requested his young associate to cover for his client, he had not given that attorney the file until 11 P.M. the previous night (Aa49). The only prior contact his associate had with the case had occurred several weeks earlier during plea negotiations (Aa17, T1-10 to 13) (Pet. App. 6a to 8a).

The unfamiliarity of this attorney with the complex wiretapping, gambling and conspiracy case so concerned the trial judge that she made extensive efforts to contact petitioner in order to direct him to immediately return to the court (Aa51). Petitioner's associate indicated that petitioner was out of the country, but he did not know where (Aa50). Calls to petitioner's answering service were to no avail (Aa50). The trial court was able to contact petitioner's daughter who advised the court that petitioner had gone to Bermuda on a four-day business trip (Aa51). The trial continued on March 2 and March 3, with petitioner absent both days (Aa52) (Pet. App. 6a to 8a).

On March 3, 1978, the trial court sent a telegram to petitioner directing him to appear before her on March 6 (Aa52). He appeared before the court on that day and was afforded an opportunity to explain his absence on

March 2 and 3. His excuse was simply that he had not felt it necessary to advise the court of his intended trip to Bermuda and his resulting unavailability (Aa52) (Pet. App. 9a).

Finding that petitioner's unauthorized absence in direct contravention of a court directive disrupted the court proceedings, constituted a lack of respect for the court and conduct prejudicial to the administration of justice, the trial court found petitioner guilty of contempt in the presence of the court pursuant to R. 1:10-1. Thereafter, petitioner was directed to appear on April 14 for sentencing on the contempt citation (6T4-11 to 12). On that date, petitioner was again offered an opportunity to explain his failure to appear in court on March 2 and 4 (Aa41). He did not object to the matter proceeding summarily or request that it be referred to another trial judge. On April 21, 1978 the trial court filed a certification, required pursuant to New Jersey Court Rule 1:10-1, and entered an order holding petitioner in contempt of court *in facie curiae* and imposing a fine of $500 (Aa47 to Aa44) (Pet. App. 10a to 11a).

Petitioner appealed to the Appellate Division of the Superior Court of New Jersey. Apparently concluding that an attorney's absence can never constitute contempt in the presence of the court, the Appellate Division of the Superior Court of New Jersey reversed the trial court's order. Thereafter on petition for certification to the Supreme Court of New Jersey, the Supreme Court affirmed the finding of contempt. Recognizing that both federal and State law authorized the use of summary contempt only where the contempt occurs in the presence of the court (Pet. App. 16a to 18a), the court upheld the exercise of contempt upon the particular facts of this case, noting that petitioner's explanation for his absence was frivolous

and that "[h]is unexcused absence was egregious when viewed against the background of a multiple defendant criminal gambling conspiracy case and the admonitions of the trial judge" (Pet. App. 32a to 33a). This petition for writ of certiorari followed.

ARGUMENT

The court should deny the petition for writ of certiorari because the determination of the Supreme Court of New Jersey concerns solely the proper scope of New Jersey Court Rule 1:10-1 and thus does not present any important far-ranging issues or conflicts with federal decisions and because it properly concludes that petitioner's unauthorized, disruptive absence for a four-day weekend trip to Bermuda in direct contravention of the trial court's orders was punishable by summary contempt.

This case involves a determination by a trial court of New Jersey during a complex criminal trial that summary contempt proceedings pursuant to the New Jersey Court Rules were appropriate to control action by a defense attorney which was disruptive and in direct contravention of the court's orders. The decision of the Supreme Court of New Jersey in affirming the exercise of the summary contempt was well grounded in the particular facts of the case and does not raise any important or compelling reason which would justify review by the court.

It is unquestioned that the power to punish summarily for contempt is inherent in the nature of the courts. *Ex parte Terry,* 128 U.S. 289 (1888). "The pith," this court has observed,

> ". . . of this rather extraordinary power to punish without the formalities required by the Bill of Rights for prosecution of federal crimes generally, is that the necessities of the administration of justice require such summary dealing with obstruction to it. It is a mode of vindicating the majesty of law, in its active manifestations, against obstruction and outrage. . . ." *Offutt* v. *United States,* 348 U.S. 11, 14 (1954).

Because the full panoply of procedural due process rights are not applicable to the exercise of summary contempt, it is reserved "for exceptional circumstances." *Harris* v. *United States,* 382 U.S. 162, 164 (1965); *In re Yengo,* 84 N.J. 111, 122 (1980) (Pet. App. 17a). Thus it has been held that the contemptuous conduct must have occurred in the presence of the court such that no further evidence need be adduced and that the act must impact adversely upon authority of the court. *In re Oliver,* 333 U.S. 257 (1940); *In re Yengo, supra* (Pet. App. 16a).

The actual boundaries, however, defining the type of disruptive conduct occurring in the presence of the court which justifies summary contempt, have been imposed by statute, pertinent court rules and applicable case law. Thus, for instance, while some federal courts may have concluded that pursuant to FRCrP 42(a) conduct which does not occur directly in the presence of the court cannot be punished summarily, New Jersey courts have not so limited the scope of New Jeresy Court Rule 1:10-1. Such conduct in New Jersey need not be directly seen or heard. *State* v. *Sax,* 139 N.J. Super. 157 (App. Div.), certif. den. 70 N.J. 525 (1976); *McAllister* v. *McAllister,* 95 N.J. Super. 426 (App. Div. 1967). Prior to the Supreme Court's decision at issue here, New Jersey Court Rule 1:10-1 had been construed to extend to an attorney's failure to appear in

court. *State* v. *Dias,* 76 N.J. Super. 337 (App. Div. 1962); *In re Clawans,* 69 N.J. Super. 373 (App. Div. 1961), certif. den. 36 N.J. 296 (1962), *cert.* den. 370 U.S. 905 (1962). See also *In re Gates,* 478 F.2d 998 (D.C. Cir. 1972); *In re Niblack,* 476 F.2d 930 (D.C. Cir. 1972); *Chula* v. *Superior Court,* 57 Cal. 2d 199, 368 P.2d 107, 118 Cal. Rptr. 507 (Sup. Ct. 1962).*

The decision in this case, therefore, is grounded upon the particular facts and New Jersey Court Rule 1:10-1, not upon any principles of constitutional law. Given these facts the conduct was properly found to be within the scope of the summary contempt power authorized by the New Jersey Court Rule. At the time of petitioner Yengo's absence, the trial court knew of its own senses: a) that all attorneys involved in the lengthy, complex trial had been ordered to be ready to proceed with the trial and not to engage in any other activity with a warning that failure

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* Petitioner's reliance upon contrary federal decisions in an effort to demonstrate the existence of a substantial conflict on an issue of constitutional importance is misplaced. While there are cases reaching a conclusion that attorney absences or tardiness cannot be punished summarily, *e.g., In re Allis,* 531 F.2d 1931 (9th Cir. 1976), *Jessup* v. *Clark,* 490 F.2d 1068 (3rd Cir. 1973), *United States* v. *Delahanty,* 488 F.2d 396 (6th Cir. 1973), those cases arise under FRCrP 42(a). This case concerns the scope of summary contempt under the particular court rule applicable in New Jersey. In this respect, it should be noted that while FRCrP 42(a) authorizes summary contempt if the court "saw or heard" the conduct, New Jersey Court Rule 1:10-1 refers to contempt "in the actual presence of the court." Moreover, the facts in the cases relied on by petitioner are distinguishable. In *Jessup,* for instance, the Court of Appeals for the Third Circuit found, contrary to this case, that no disruption occurred and in *Delahanty* the Court of Appeal for the Sixth Circuit found the conduct involved not contemptuous. Here, not even petitioner denies that his conduct was contemptuous.

to abide by the order would result in sanctions;* b) that petitioner knew of this directive as evidenced by his earlier request that the trial court advise another trial court of his commitment; c) that petitioner had left for a four-day weekend trip to Bermuda; d) that petitioner's absence was unauthorized; and e) that petitioner's absence caused considerable disruption and an additional expenditure of the court's time, not to mention the time of the jurors and other attorneys.

In contrast to the federal cases relied upon by petitioner, the absence in this case was disruptive. Although petitioner had requested his associate to cover for him, his associate's only contact with the case occurred several weeks earlier during plea negotiations and a 15 minute conversation with petitioner the night before. Because of his associate's unfamiliarity with the case, petitioner's absence posed a potential prejudice to the parties in the trial, particularly his client, and resulted in the time-consuming, exhaustive efforts by the court to locate petitioner and to assure herself of his associate's ability to adequately represent petitioner's client. Although the trial court allowed the trial to continue with petitioner's client represented by his associate, the trial would have had to have been adjourned if the State's expert had taken the stand, scheduled to occur on the second day of petitioner's absence (Aa51). Further, as noted by Justice Handler in his con-

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* In Point V of his petition, petitioner suggests that the permission granted other attorneys to have co-counsel cover for them on several occasions removes the contemptuous nature of his conduct. While the record does indicate that the court authorized attorneys to cover for each other on a few occasions, the "cover" was for usually a few minutes, never more than a half-hour and was necessitated by the weather and travel conditions. In stark contrast is petitioner's four-day vacation trip to Bermuda. Petitioner cannot seriously contend that these short periods of "cover" reasonably led him to believe that an extended weekend trip to Bermuda would be authorized.

curring opinion, the "admixture" of conspiracy, gambling and wiretapping offenses created for the court "especially complex and unsual trial problems" raising "special concerns for the trial judge as to attorney conduct" (Pet. App. 34a). Since petitioner's punctual appearance would be required throughout the rest of the trial, it was absolutely necessary for the trial court to immediately impress upon him and the other attorneys in the trial the authority of her directive concerning timely appearances.

Moreover, no evidence was necessary at the time of the unauthorized absence to support a certification that petitioner's behavior was contumacious. Nonetheless, petitioner was afforded on two subsequent occasions an opportunity to demonstrate that the facts as then appeared to the court were not accurate. This petitioner could not do; in fact he simply reaffirmed what had appeared to the trial court at the time of his absence. Under any reasonable interpretation of the law, the facts in this case fully support the application of a contempt *in facie curiae* pursuant to New Jersey Court Rule 1:10-1.

Even where summary contempt is not the appropriate procedure,

> "The exact form of the procedure in the prosecution of such contempt is not important . . . 'all that is requisite to their validity is that, when not taken for matters occurring in open court, notice should be given to the attorney of the charges made, an opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted so that it be without oppression or unfairness, is a matter of judicial regulation.'" *Cooke* v. *United States,* 267 U.S. 517 (1925).

In the present case, these requirements of due process were fully met. Petitioner was offered two opportunities

to provide a defense or explanation. While he might not have had detailed notice of the nature of the proceeding on the first occasion, he did thereafter. See *In re Allis,* 531 F.2d 1391 (9th Cir. 1976) (10 minute recess to give counsel opportunity to obtain a lawyer and prepare a defense was sufficient due process protection).*

In Point IV of his petition, petitioner urges that the *"in camera"* nature of the proceedings violated an asserted right to a "public" trial pursuant to the Sixteenth Amendment. The sole support for this contention is *In re Oliver, supra.* The contempt order at issue in that case occurred, however, during the course of a secret grand jury proceeding. In contrast, the proceedings in this case were held in open court, albeit with the court cleared for petitioner's own protection. Regardless of the extent of the asserted right to public trial, it has consistently been held that such right is not absolute and that trial courts possess discretion to remove the public from the courtroom. *Richmond Newspaper Inc.* v. *Commonwealth of Virginia,* 448 U.S. ——, —— footnote 18, (1980); *United States ex rel Laws* v. *Yeager,* 448 F.2d 74, 80 (3rd Cir. 1979), *cert.* den. 405 U.S. 976 (1972). See *Levine* v. *United States,* 362 U.S. 610 (1960). It can hardly be contended that the trial court's efforts to protect the integrity of petitioner by clearing the court was abusive.

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* In Point III of his petition, petitioner suggests that an additional requirement of procedural due process is that the summary contempt proceedings occur before a different judge. While it has been suggested that it might be better practice to do so, it is not a constitutional requirement unless the trial court becomes so embroiled in the matter that he can no longer retain an objective perspective. *Taylor* v. *Hayes,* 418 U.S. 488 (1974). No such contention has ever been raised in this case.

Finally, it must be noted that this case is not an appropriate vehicle for consideration of the constitutional issues raised by petitioner. At no time during the proceedings before the court did petitioner ever request any of the rights he now seeks here. Like the attorney in *Peltier* v. *Peltier,* —— R.I. ——, 388 A.2d 22 (Supreme Court 1978), the petitioner voluntarily appeared on March 6 and provided to the court his explanation. Even if it could be said that any waiver at that time was not knowing, certainly during the second proceeding in April he had sufficient time to determine whether any of his constitutional rights should be raised. This he did not do and therefore waived whatever rights he might have had. *Peltier* v. *Peltier, supra,* 388 A.2d at 24. See *Levine* v. *United States, supra.*

In sum, then, while constitutional considerations of due process require that the summary contempt power be sparingly used, the exercise of that power in this case pursuant to New Jersey Court Rule 1:10-1 was appropriate. Contrary to petitioner's assertions, therefore, the validity of the trial court's action in punishing petitioner for his unauthorized disruptive four-day trip to Bermuda does not entail broad issues of due process rights. Further, the assertions of Sixth Amendment violations are insubstantial. Finally, petitioner never objected to any constitutional improprieties . Accordingly, this case does not present issues of broad public importance or of substantial constitutional dimensions warranting this court's review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: December 19, 1980